DOCKET

SUPREME COURT

OF THE UNITED STATES

No	10-895
Title	Rafael Arriaza Gonzalez, Petitioner v. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division
Docketed	January 11, 2011
Lower Ct	United States Court of Appeals for the Fifth Circuit
Case Nos	(08-10871)
Decision Date	October 6, 2010
Questions Presented	

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 4 2011	Petition for a writ of certiorari filed. (Response due February 10, 2011)
Feb 23 2011	DISTRIBUTED for Conference of March 18, 2011
Mar 3 2011	Response Requested. (Due April 4, 2011)
Mar 25 2011	Order extending time to file response to petition to and including May 4, 2011.
May 4 2011	Brief of respondent Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, in opposition filed.
May 16 2011	Reply of petitioner Rafael Arriaza Gonzalez filed.
May 17 2011	DISTRIBUTED for Conference of June 2, 2011
Jun 6 2011	DISTRIBUTED for Conference of June 9, 2011
Jun 13 2011	Petition GRANTED limited to the following questions: 1. Was there jurisdiction to issue a certificate of appealability under 28 U. S. C. § 2253(c) and to adjudicate petitioner's appeal? 2. Was the application for a writ of habeas corpus out of time under 28 U. S. C. § 2244(d)(1) due to the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review?
Jul 1 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 5, 2011.
Jul 1 2011	The time to file respondent's brief on the merits is extended to and including September 14, 2011.
Aug 1 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Aug 5 2011	Joint appendix filed. (Statement of costs filed)
Aug 5 2011	Brief of petitioner Rafael Arriaza Gonzalez filed.
Aug 8 2011	SET FOR ARGUMENT ON Wednesday, November 2, 2011.
Aug 10 2011	Record from U. S. C. A. for 5th Circuit is electronic.
Aug 12 2011	Brief amici curiae of National Association of Criminal Defense Lawyers and the

	Innocence Network filed
Aug 12 2011	Brief amicus curiae of The Rutherford Institute filed
Aug 19 2011	CIRCULATED
Sep 14 2011	Brief of respondent Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed)
Sep 21 2011	Brief amicus curiae of the United States filed. (Distributed)
Sep 21 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed
Oct 14 2011	Reply of petitioner Rafael Arriaza Gonzalez filed. (Distributed)
Oct 17 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED
Nov 2 2011	Argued. For petitioner: Patricia A. Millett, Washington, D. C. For respondent: Jonathan F. Mitchell, Solicitor General, Austin, Tex., and Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Nov 3 2011	Letter from Counsel for the petitioner filed. (Distributed)

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 10-___

Supreme Court, U.S.
FILED

IN THE

10-895 JAN 4 - 2011

Supreme Court of the United States

OFFICE OF THE CLERK

RAPHAEL ARRIAZA GONZALEZ,

Petitioner

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Title I, 110 Stat. 1217, establishes a one-year statute of limitations for a state prisoner to file a federal habeas corpus petition. As relevant here, that limitation period runs from "the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

The Questions Presented are:

I. Whether state law is relevant to determining when the States' direct review processes conclude, as the Seventh, Eighth, and Eleventh Circuits have held, or whether AEDPA dictates a single federally prescribed point in time when all state direct-review processes are deemed to have concluded, as the Fifth and Ninth Circuits have held

II. Whether, under AEDPA, the "conclusion of direct review" occurs upon (i) issuance of an intermediate appellate court's mandate, as the Eighth Circuit has held, (ii) expiration of the time for seeking discretionary review in the state's highest court, as the Fifth Circuit held, or (iii) issuance of the intermediate appellate court's decision, as the Ninth Circuit has held.

III. Whether "expiration of the time for seeking [direct] review" under Section 2244(d)(1)(A) includes the ninety-day period for filing a petition for a writ of certiorari with this Court even when the petitioner forewent discretionary review in the state's highest court, as the Fourth and Seventh Circuits have held, or excludes that time, as the Fifth, Eighth, Ninth, and Eleventh Circuits have held.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 8
I. THE COURT OF APPEALS' DECISION CEMENTED A THREE-TIERED CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS 11
A. The Holding That State Law Is Irrelevant To Determining When A State's Direct Review Process Concludes Comports With Ninth Circuit Law But Conflicts With Four Other Circuits 12
B. The Fifth Circuit's Decision Creates A Conflict In What Finality Rule Applies 19
C. The Fifth Circuit Has Expanded A Widespread Conflict Over Whether The Certiorari Timeframe Applies To State Prisoners Who Forgo Discretionary Review In Their State's Highest Court 21
II. THE FIFTH CIRCUIT'S RULING IS ERRONEOUS 25
CONCLUSION 31

Appendix

United States Court of Appeals for the Fifth Circuit Opinion (October 6, 2010) 1a

United States District Court for the Northern District of Texas Order (August 20, 2008).... 9a

Findings, Conclusions, and Recommendation of the United States Magistrate Judge (July 18, 2008)..... 11a

28 USC § 2244(d) 22a

TABLE OF AUTHORITIES

Cases

Allen v. Siebert,
552 U.S. 3 (2007) 5

Anderson v. Litscher,
281 F.3d 672 (7th Cir. 2002) 23

Baker v. Darr Equip. Co.,
233 P.3d 419 (Okla. Civ. App. 2010) 13

Balsewicz v. Kingston,
425 F.3d 1029 (7th Cir. 2005), cert. denied,
546 U.S. 1144 (2006) 3, 4, 17, 22

Bell v. Maryland,
378 U.S. 226 (1964) 22, 30

Brown v. Milyard,
373 Fed. App'x 853 (10th Cir. 2010), cert
denied, 131 S. Ct. 532 (2010) 20

Brown v. Texas,
443 U.S. 47 (1979) 21

Burton v. Stewart,
549 U.S. 147 (2007) 5

Carey v. Saffold,
536 U.S. 214 (2002) 10, 18

Carver v. Mack,
No. 2005CA0053, 2006 WL 1537754 (Ohio Ct.
App. June 5, 2006) 13

Clay v. United States,
537 U.S. 522 (2003) ..... *passim*

Day v. McDonough,
547 U.S. 198 (2006) 5

Duncan v. Walker,
533 U.S. 167 (2001) 10

Evans v. Chavis,
546 U.S. 189 (2006) 5, 18

Ex parte Johnson,
12 S.W.3d 472 (Tex. Crim. App. 2000) 6, 12

Foxworth v. St. Amand,
929 N.E.2d 286 (Mass. 2010) 13

Frasch v. Peguese,
414 F.3d 518 (5th Cir. 2005) 17

Gonzalez v. State,
No. 05-05-01140-CR, 2006 WL 1900888 (Tex. App. July 12, 2006) 5

Griffith v. Kentucky, 479 U.S. 314 (1987) 30

Hemmerle v. Schriro,
495 F.3d 1069 (9th Cir. 2007), cert. denied,
129 S. Ct. 33 (2008) 4, 15

Hill v. Braxton,
277 F.3d 701 (4th Cir. 2002) 4, 23

Holland v. Florida,
130 S. Ct. 2549 (2010) 5, 29

In re Long,
984 S.W.2d 623 (Tex. 1999) (per curiam) 13

In re Runyan,
853 P.2d 424 (Wash. 1993) 13

Jimenez v. Quarterman,
129 S. Ct. 681 (2009) 11, 25, 28

Johnson v. State,
900 S.W.2d 940 (Ark. 1995) 13

Jones v. Florida,
602 So. 2d 606 (Fla. Ct. App. 1992) 13, 26

LaBoy v. State,
981 A.2d 1173 (Del. 2009) 13

Lawrence v. Florida,
549 U.S. 327 (2007) 8, 20, 28

Leer v. State,
218 P.3d 1173 (Idaho Ct. App. 2009) 13

Magwood v. Patterson,
130 S. Ct. 2788 (2010) 5

Massey v. Secretary Dep't of Pub. Safety & Corr. Servs.,
886 A.2d 585 (Md. 2005) 13

Matter of Disciplinary Action Against Larson,
485 N.W.2d 345 (N.D. 1992) 13

Metlakatla Indian Cmty. Annette Island R. v. Egan,
363 U.S. 555 (1960) 22

Nash v. Florida Indus. Comm'n,
389 U.S. 235 (1967) 21

Nix v. Secretary for the Dep't of Corrs.,
393 F.3d 1235 (11th Cir. 2004), cert. denied,
545 U.S. 1114 (2005) 22

People v. Alexander,
129 P.3d 1051 (Colo. Ct. App. 2005) 13

Polk v. State,
789 N.W.2d 437 (Iowa Ct. App. 2010) 13

Puckett v. State,
834 So. 2d 676 (Miss. 2002) 13

Pugh v. Smith,
465 F.3d 1295 (11th Cir. 2006) 4, 24

Riddle v. Kemna,
523 F.3d 850 (8th Cir. 2008) ..... *passim*

Roberts v. Cockrell,
319 F.3d 690 (5th Cir. 2003) ..... *passim*

Siebert v. State,
778 So. 2d 842 (Ala. Crim. App. 1999) 13

State v. Dorton,
641 S.E.2d 357 (N.C. Ct. App. 2007) 13

State v. Febles,
115 P.3d 629 (Ariz. Ct. App. 2005) 13

State v. Gubitosi,
888 A.2d 1262 (N.H. 2005) 13

State v. Hutcherson,
847 So. 2d 378 (Ala. Crim. App. 2001) 13

State v. Simmons,
659 N.W.2d 507 (Wis. Ct. App. 2003) 13

State v. White,
590 N.W.2d 863 (Neb. 1999) 13

Tinker v. Moore,
255 F.3d 1331 (11th Cir. 2001), cert. denied,
534 U.S. 1144 (2002) 3, 16

United States v. Cheek,
3 F.3d 1057 (7th Cir. 1993) 29

United States v. Felton,
811 F.2d 190 (3d Cir. 1987) 29

United States v. Ferris,
751 F.2d 436 (1st Cir. 1984) 29

United States v. Kington,
875 F.2d 1091 (5th Cir. 1989) 29

United States v. Lasteed,
832 F.2d 1240 (11th Cir. 1987), cert. denied,
485 U.S. 1022 (1988) 29

United States v. Long,
900 F.2d 1270 (8th Cir. 1990) 29

United States v. Rivera,
844 F.2d 916 (2d Cir. 1988) 29

United States v. Robertson,
810 F.2d 254 (D.C. Cir. 1987) 29

United States v. Ross,
654 F.2d 612 (9th Cir. 1981) 29

United States v. Scalf,
760 F.2d 1057 (10th Cir. 1985) 29

United States v. Staton,
94 F.3d 643 (4th Cir. 1996) 29

Wesley v. Snedeker,
159 Fed. App'x 872 (10th Cir. 2005) 19, 24

Wixom v. Washington,
264 F.3d 894 (9th Cir. 2001) ..... *passim*

Woodson v. Lee,
392 P.2d 419 (N.M. 1964) 13

Yetman v. Gilbert Corp. of Delaware,
483 S.E.2d 878 (Ga. Ct. App. 1997) 13

Statutes

18 U.S.C. § 3161(d)(2) 29

18 U.S.C. § 3161(e) 29

28 U.S.C. § 1257(a) 21

28 U.S.C. § 2244(d)(1)(A) ..... *passim*

28 U.S.C. § 2244(d)(2) 6

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Title I, 110 Stat. 1217 ..... i, 2

N.C. Gen. Stat. § 15A-1415(a)(2) (2010) 13

Nev. Rev. Stat. § 34.726(1) (2010) 13
S.C. Code 1976 § 17-27-45(A) (2010) 13
Wis. Stat. Ann. § 809.26(1) (2010) 27

Other Authorities

Brian R. Means, *Federal Habeas Manual* § 9A:14 (2010) 3, 4, 24
James C. Duff, *Judicial Business of the United States Courts: 2009 Annual Report of the Director of the Administrative Office of the United States Courts* (2010) 9

Rules

Supreme Court Rule10(a) 21
Supreme Court Rule10(b) 21
Supreme Court Rule13.1 21
Ala. R. App. P. 39(b)(3) 26
Ala. R. APP. P. 41(a) 26
Ala. R. App. P. 41(a)(1) 28
Ariz. R. Crim. P. 31.23(a)(2) 28
Ala. R. Crim. P. 32.2(c)(1) 26
Del. Sup. Ct. R. 19(a) 27, 28
Fla. R. App. P. 9.340(a) 27
Idaho R. App. P. 38(b) 27
Idaho R. App. P. 38(c) 27
Mass. R. App. P. 23 27
Mass. R. App. P. 27.1(a) 27
Miss. R. App. P. 17(b) 27
Miss. R. App. P. 41(b) 27
Mo. S. Ct. R. 30.24(b) 27

Mo. S. Ct. Op. R. 8.02(D)(1) 13
Mo. S. Ct. Op. R. (D)(3)(b) 13
N.M. R. App. P. 12-402(C) 27
Neb. Ct. R. App. P. § 2-114(A)(1) 27
S.C. R. App. Prac. 221(b) 27
Tex. R. Crim. P. 11.07 § (3) 26

PETITION FOR A WRIT OF CERTIORARI

Raphael Arriaza Gonzalez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 623 F.3d 222. The district court's opinion (App., *infra*, 9a-10a) is not reported. The magistrate judge's recommendation (App., *infra*, 11a-21a) is also not reported.

JURISDICTION

The court of appeals entered its judgment on October 6, 2010. App., *infra*, 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides, in relevant part:

§ 2244. Finality of determination

* * *

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct

review or the expiration of the time for seeking such review.

The full text of 28 U.S.C. § 2244(d) is reproduced at App., *infra*, 22a.

STATEMENT OF THE CASE

The enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996 imposed a one-year statute of limitations on all habeas petitions filed in federal court by state prisoners. Pub. L. No. 104-132, Title I, Section 101, 110 Stat. 1217. That limitations period commences at "the latest of" four specified dates, including, as relevant here, "the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

This case arises at the intersection of three circuit conflicts concerning that trigger point for Section 2244(d)(1)(A)'s limitation period.

First, when a state prisoner on direct appeal forgoes discretionary review by the state's highest court, the federal courts of appeals have issued conflicting decisions concerning whether state law plays any role in determining when a state-court judgment of conviction becomes "final by the conclusion of direct review." The Fifth Circuit here, like the Ninth Circuit, holds that state law is irrelevant in determining whether Section 2244(d)(1)(A)'s "conclusion of direct review" test has been met. *See* App., *infra*, 7a-8a; *Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003); *Wixom v. Washington*,

264 F.3d 894 (9th Cir. 2001), cert. denied, 534 U.S. 1143 (2002). The Seventh, Eighth, and Eleventh Circuits, however, have ruled that state-law processes are relevant in determining when the state's own direct review process has concluded. *See Riddle v. Kemna*, 523 F.3d 850 (8th Cir. 2008) (en banc); *Balsewicz v. Kingston*, 425 F.3d 1029 (7th Cir. 2005), cert. denied, 546 U.S. 1144 (2006); *Tinker v. Moore*, 255 F.3d 1331 (11th Cir. 2001), cert. denied, 534 U.S. 1144 (2002). *See generally* Brian R. Means, *Federal Habeas Manual* § 9A:14 (2010) (discussing the circuit conflict).

Second, if AEDPA dictates a uniform federal point when the conclusion of direct review is deemed to occur, then, as the Fifth Circuit expressly acknowledged, App., *infra*, 7a-8a, its holding that the expiration of the time period for seeking discretionary review alone determines finality squarely conflicts with the holding of the en banc Eighth Circuit in *Riddle v. Kemna*, *supra* (which deems direct review to be final when the appellate court issues its mandate), and with the law of the Ninth Circuit (which treats the appellate court's issuance of its decision as uniformly concluding direct review), *Wixom*, *supra*.

Third, with respect to Section 2244(d)(1)(A)'s second clause, which addresses the expiration of time for seeking further review, the courts of appeals have issued conflicting decisions concerning whether the ninety-day timeframe for seeking certiorari review in this Court should be counted when

state prisoners do not seek discretionary review in their highest state court. Fifth Circuit law does not factor that ninety-day time period into its calculation of the relevant time period, App., *infra*, 4a; *Roberts*, 319 F.3d 690. Nor would the Eighth, Ninth, or Eleventh Circuits. *Riddle*; 523 F.3d at 855; *Hemmerle v. Schriro*, 495 F.3d 1069 (9th Cir. 2007), cert. denied, 129 S. Ct. 33 (2008); *Pugh v. Smith*, 465 F.3d 1295 (11th Cir. 2006). But the Fourth and Seventh Circuits have held that expiration of the time for seeking direct review must include the ninety-day certiorari timeframe regardless of whether the prisoner sought discretionary review from the State's highest court. *See Balsewicz, supra; Hill v. Braxton*, 277 F.3d 701 (4th Cir. 2002). *See generally* Means, *supra*, § 9A:14 (noting and documenting the circuit conflict).

These inter-circuit conflicts are entrenched and recurring, given the large number of federal habeas petitions filed by state prisoners each year. As the existence of the multi-tiered conflicting interpretations by the federal courts of appeals documents, a significant percentage of state prisoners on direct review forgo discretionary review in their State's highest court, repeatedly confronting the courts of appeals with these questions and perpetuating and expanding the inconsistency in federal law. This Court's review is needed to bring harmony to federal law and to ensure that AEDPA operates with the respect for state-law processes that Congress intended and this Court's decisions have enforced.

Indeed, given Congress's careful balancing of prisoners' substantial interest in obtaining federal habeas corpus review with the need for finality and stability in collateral review processes, this Court has long been particularly attentive to the need to eliminate recurring conflicts in the interpretation and application of AEDPA's habeas review provisions.[1] This case would allow the Court to consider and resolve these three intersecting conflicts efficiently in a single case.

1. Petitioner Raphael Arriaza Gonzalez was convicted of murder in Texas state court on June 14, 2005, and was sentenced to thirty years in prison. App., *infra*, 2a. He filed a timely appeal to the Texas intermediate court of appeals, which affirmed his conviction on July 12, 2006. *Ibid.*; see *Gonzalez v. State*, No. 05-05-01140-CR, 2006 WL 1900888 (Tex. App. July 12, 2006). Gonzalez's counsel did not file a petition for discretionary review with the Texas Court of Criminal Appeals within the thirty-day timeframe permitted by state law, Tex. R. App. P. 68.2(a). App., *infra*, 2a. The court of appeals issued its mandate on September 26, 2006. *Ibid.* Under Texas law, the issuance of

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[1] *See, e.g.*, *Magwood v. Patterson*, 130 S. Ct. 2788 (2010); *Holland v. Florida*, 130 S. Ct. 2549 (2010); *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009); *Allen v. Siebert*, 552 U.S. 3 (2007); *Lawrence v. Florida*, 549 U.S. 327 (2007); *Burton v. Stewart*, 549 U.S. 147 (2007); *Day v. McDonough*, 547 U.S. 198 (2006); *Evans v. Chavis*, 546 U.S. 189 (2006).

the appellate court's mandate marked the conclusion of direct review in the state court system. *See, e.g., Ex parte Johnson*, 12 S.W.3d 472 (Tex. Crim. App. 2000).

2. On July 19, 2007, Gonzalez filed in Texas state court a petition for a writ of habeas corpus under Texas Rule of Criminal Procedure 11.07. App., *infra*, 2a. The Texas Court of Criminal Appeals denied that petition on the merits on November 21, 2007. *Ibid.*

3. On January 24, 2008, Gonzalez filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas. App., *infra*, 2a. Excluding the time during which his properly filed state habeas petition was pending, 28 U.S.C. § 2244(d)(2), Gonzalez's federal habeas petition was filed 360 days after the state court of appeals issued its mandate concluding direct review of his conviction, and 346 days after the time period for seeking certiorari review in this Court expired. The filing, however, was 436 days after the Texas court of appeals entered its order affirming his conviction and 406 days after expiration of the time to seek discretionary review by the Texas Court of Criminal Appeals.

The district court, adopting the report and recommendation of a magistrate judge, App., *infra*, 11a-21a, dismissed the petition, *id.* at 9a-10a. Following Fifth Circuit precedent, the district court held that Gonzalez's direct appeal became "final" at the expiration of the time period for seeking discretionary review with the

Texas Court of Criminal Appeals, not the issuance of the mandate or expiration of the time period for seeking certiorari review in this Court. App., *infra*, 9a, 15a (citing *Roberts v. Cockrell*, 319 F.3d at 694-695).

4. The court of appeals granted a certificate of appealability and affirmed. App., *infra*, 1a-8a.

In concluding that Gonzalez's petition was untimely, the court of appeals held that federal courts should not rely on "state court definitions to determine finality" under 28 U.S.C. § 2244(d)(1)(A). App., *infra*, 8a. The court held instead that Section 2244(d)(1)(A) imposes "a uniform federal rule" for deeming state-law direct-review processes to be concluded. App., *infra*, 7a-8a. (quoting *Clay v. United States*, 537 U.S. 522, 531 (2003)).

In so holding, the Fifth Circuit acknowledged, App., *infra*, 7a, that its decision directly conflicted with that of the en banc Eighth Circuit in *Riddle v. Kemna*, 523 F.3d 850 (8th Cir. 2008), but declared the Eighth Circuit's decision "unpersuasive," App., *infra*, 7a. The court instead expressly reaffirmed an earlier Fifth Circuit decision, *Roberts v. Cockrell*, *supra* (followed at App, *infra*, 8a), which had similarly held that state-law definitions of when the State's direct review processes conclude are "of no consequence for the purposes of § 2244(d)(1)(A)." *Roberts* itself had acknowledged the conflict between Fifth Circuit law and that of the Eleventh Circuit, which (like the Eighth Circuit) held that

Section 2244(d)(1)(A) required reference to a Florida rule that direct review by an intermediate court of appeals ends when the mandate issues. *Roberts*, 319 F.3d at 694 (disagreeing with *Tinker v. Moore*, *supra*)).

The Fifth Circuit further ruled that, under Section 2244(d)(1)(A), the appropriate uniform federal rule for determining when direct intermediate-level review concludes is the expiration of the time period for seeking discretionary review from the state's highest court. App., *infra*, 4a.

The Fifth Circuit also rejected (App., *infra*, 4a-8a) the Eighth Circuit's alternative holding that, under *Lawrence v. Florida*, 549 U.S. 327 (2007), the appellate court's issuance of its mandate is the proper determinant of finality under AEDPA. *Compare Riddle*, 523 F.3d at 855-856.

Finally, as required by *Roberts*, the court of appeals excluded from its calculation of the "time for seeking [direct] review" under Section 2244(d)(1)(A) the ninety-day timeframe for seeking certiorari review in this Court. App., *infra*, 4a; *see Roberts*, 319 F.3d at 693 & n.14.

REASONS FOR GRANTING THE WRIT

The trio of circuit conflicts that has now been cemented in the courts of appeals' decisions interpreting 28 U.S.C. § 2244(d)(1)(A) necessitates this Court's intervention. The Fifth Circuit has now expressly reaffirmed its precedent, acknowledging its direct conflict at

two different levels with an intervening en banc decision of the Eighth Circuit. App., *infra*, 7a-8a. That decision, moreover, expanded a preexisting conflict between the law of the Fifth Circuit on the one hand, and the law of the Seventh and Eleventh Circuits on the other hand concerning the role of state law in determining the finality of the state's own direct review processes under Section 2244(d)(1)(A). Whether the conclusion of direct review in the state-court system should be determined with reference to state law – or whether state law is irrelevant to that inquiry – are critically important and recurring questions of law that have arisen repeatedly among the more than 17,000 federal habeas petitions filed by state prisoners each year. See, *e.g.*, James C. Duff, *Judicial Business of the United States Courts: 2009 Annual Report of the Director of the Administrative Office of the United States Courts* at 142 (Table C-2) (2010).

And even if the Fifth Circuit were correct that a single wooden federal rule defining the conclusion of all state court appellate review processes applied, the "uniform federal rule" sought by the Fifth Circuit here, App., *infra*, 7a, cannot exist until this Court determines whether that single rule is exclusively the expiration of the time for seeking discretionary review in the state's highest court (as the Fifth Circuit held), the issuance of the intermediate appellate court's mandate (as the en banc Eighth Circuit held), or the issuance of the

intermediate court's decision (as the Ninth Circuit has held).

On top of that, the Fifth Circuit's decision compounded yet another circuit conflict concerning whether this Court's certiorari timeframe defines "the expiration of the time for direct review" when, for differing reasons, discretionary review in a State's highest court is not sought.

Allowing these conflicts to fester deprives AEDPA and the federal habeas process of the very stability and federalism-based respect for state criminal processes that this Court has long recognized as central to AEDPA's purpose. *See Carey v. Saffold*, 536 U.S. 214, 222 (2002) (AEDPA's purpose is to promote "'comity, finality, and federalism'" by "respecting the interest in the finality of state court judgments.") (quoting *Duncan v. Walker*, 533 U.S. 167, 178 (2001)). The ability of state prisoners to obtain federal habeas review, and the ability of States to obtain definitive conclusion of the collateral review process, should not vary based on circuit court geography. Had Gonzalez's habeas petition been filed in the Seventh, Eighth, or Eleventh Circuits, it would have been timely. There should not be a different rule for the Fifth and Ninth Circuits. By the same token, States in the Seventh, Eighth, and Eleventh Circuits now have the finality of their convictions determined differently than do their sister States in the Fifth and Ninth Circuits. Viewed

from either perspective, the inconsistency and variability in the interpretation of a single provision of a single federal law are wrong and should be harmonized by this Court.

I. THE COURT OF APPEALS' DECISION CEMENTED A THREE-TIERED CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

This Court noted in *Clay v. United States* , 537 U.S. 522, 531 (2003) that Section 2244(d)(1)(A) prescribes a "uniform" statutory standard for determining the finality of direct appellate review in state court proceedings. *See also Jimenez v. Quarterman*, 129 S. Ct. 681, 686 (2009). That test is "the latest of * * * the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). This case presents the subsidiary questions of how Congress intended AEDPA's test of "the conclusion of direct review" and "the time for seeking such review" to be interpreted and applied. In three different respects, the Fifth Circuit's decision in this case expands acknowledged circuit conflicts on those questions that necessitate this Court's review.

A. The Holding That State Law Is Irrelevant To Determining When A State's Direct Review Process Concludes Comports With Ninth Circuit Law But Conflicts With Four Other Circuits

1. While AEDPA dictates that "the date on which the judgment [of conviction] became final by the conclusion of direct review" is one trigger for the federal limitations period, 28 U.S.C. § 2244(d)(1)(A), that statutory language leaves open the question of the extent to which state law determines when "the conclusion of direct review" in the State's own processes has occurred. The Fifth Circuit's express reaffirmance of its prior ruling in *Roberts v. Cockrell*, *supra*, despite its acknowledged conflict with the law of the Eleventh Circuit and the en banc Eighth Circuit, has entrenched an inter-circuit conflict on that important and recurring question of federal law.

There is no dispute that, as a matter of Texas law, the date on which the intermediate court of appeals issued its mandate was the date on which Gonzalez's judgment of conviction became final by the conclusion of direct review in the state court system. *See, e.g.*, *Ex parte Johnson*, 12 S.W.3d 472 (Tex. Crim. App. 2000); *In re Long*, 984 S.W.2d 623,

626 (Tex. 1999) (per curiam).[2] The dispute instead is whether Section 2244(d)(1)(A) factors

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[2] Almost half of the States define finality by issuance of the mandate or an analogous procedure. *See Siebert v. State*, 778 So. 2d 842, 848-849 (Ala. Crim. App. 1999), disapproved of on other grounds in *State v. Hutcherson*, 847 So. 2d 378 (Ala. Crim. App. 2001) (utilizing a "certificate of judgment," which is similar to a mandate); *State v. Febles*, 115 P.3d 629, 632-6333 (Ariz. Ct. App. 2005) (mandate); *Johnson v. State*, 900 S.W.2d 940, 951 (Ark. 1995) (mandate); *People v. Alexander*, 129 P.3d 1051, 1056 (Colo. Ct. App. 2005) (mandate); *LaBoy v. State*, 981 A.2d 1173 (Del. 2009) (unpublished table decision) (mandate); *Jones v. Florida*, 602 So. 2d 606, 607-08 (Fla. Ct. App. 1992) (mandate); *Yetman v. Gilbert Corp. of Delaware*, 483 S.E.2d 878, 881 (Ga. Ct. App. 1997) ("remittitur"); *Leer v. State*, 218 P.3d 1173, 1175 (Idaho Ct. App. 2009) (utilizing a "remittitur"); *Polk v. State*, 789 N.W.2d 437 (Iowa Ct. App. 2010) (unpublished table decision) (utilizing "procedendo"); *Massey v. Secretary Dep't of Pub. Safety & Corr. Servs.*, 886 A.2d 585, 602 (Md. 2005) (mandate); *Foxworth v. St. Amand*, 929 N.E.2d 286, 291 (Mass. 2010) ("rescript"); *Puckett v. State*, 834 So. 2d 676, 677 (Miss. 2002) (mandate); *Riddle*, 523 F.3d at 856 (mandate); Mo. S.Ct. Op. R. 8.02(D)(1) & (D)(3)(b) (same); *State v. White*, 590 N.W.2d 863, 869 (Neb. 1999) (mandate); Nev. Rev. Stat. § 34.726(1) (2010) (same); *State v. Gubitosi*, 888 A.2d 1262, 1265 (N.H. 2005) (mandate); *Woodson v. Lee*, 392 P.2d 419, 420 (N.M. 1964) (same); *State v. Dorton*, 641 S.E.2d 357, 360 (N.C. Ct. App. 2007) (mandate); N.C. Gen. Stat. § 15A-1415(a)(2) (2010) (same); *Matter of Disciplinary Action Against Larson*, 485 N.W.2d 345, 348 n.2 (N.D. 1992) (mandate); *Carver v. Mack*, No. 2005CA0053, 2006 WL 1537754 *3 (Ohio Ct. App. June 5, 2006) (mandate); *Baker v. Darr Equip. Co.*, 233 P.3d 419, 423 (Okla. Civ. App. 2010) (mandate); S.C. Code 1976 § 17-27-45(A) (2010) (utilizing "remittitur"); *In re Runyan*, 853 P.2d 424, 429 n.4 (Wash. 1993) (mandate); *State v. Simmons*,

that state-law rule into its determination of when that State's own direct review process ends, or whether AEDPA categorically forbids any such consideration of state law and instead superimposes a federal rule for when all fifty States' individual direct review processes terminate.

The Fifth Circuit held in *Roberts* and reaffirmed here that state law is "of no consequence for the purposes of § 2244(d)(1)(A)," and that federal courts have "no reason to look to state law" in applying Section 2244(d)(1)(A). 319 F.3d at 694-695. Instead the Fifth Circuit held that a single, homogenized standard – the expiration of the time period for seeking direct review – defines when every State's direct review process terminates, regardless of what state law says. *Ibid.*; App., *infra*, at 8a.

That decision comports with the law of the Ninth Circuit, which held in *Wixom v. Washington*, 264 F.3d 894 (2001), that state law defining the issuance of the mandate as the final conclusion of the direct review process is irrelevant under Section 2244(d)(1)(A):

> That the Washington courts have interpreted the term 'final' in [Wash. Code] § 10.73.090 to mean the date at which the mandate issues is their prerogative. We, as stated above, are

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659 N.W.2d 507, *4 (Wis. Ct. App. 2003) (unpub. table decision) ("remittitur").

> constrained by Congress's definition of the term.

Id. at 898 n.4. The court held instead that "Congress's definition of the term" final meant that, as a matter of AEDPA law, the unappealed decision of the Washington Court of Appeals signified the end of direct review. *Id.* at 897-898; see also *Hemmerle v. Schriro*, 495 F.3d 1069 (9th Cir. 2007), cert. denied, 129 S. Ct. 33 (2008).

2. As the Fifth Circuit has acknowledged, however, that rule of law directly conflicts with the law of the Eleventh and the en banc Eighth Circuits. *See* App., *infra*, 7a; *Roberts*, 319 F.3d at 694 & n.16. It is also contrary to the law in the Seventh Circuit.

In *Riddle v. Kemna*, 523 F.3d 850 (2008), the Eighth Circuit went en banc to resolve the question of how to determine when a state's direct review process ends for purposes of Section 2244(d)(1)(A). The en banc court expressly rejected the argument that AEDPA demands a regimented definition of finality for all state intermediate appellate court processes. *Id.* at 853, 856.

In so holding, the court specifically disagreed with the Fifth Circuit's central rationale in this case – that *Clay v. United States*, 537 U.S. 522 (2003) requires a single federal rule of finality that ignores variations among State processes. App., *infra*, 7a-8a. As the Eighth Circuit explained, *Clay* held only that Section 2244(d)(1)(A) prescribed a uniform federal statutory measure for finality, but it did

not hold that, in applying that statutory standard, courts must ignore that test's differing "application to the varying facts of the state procedure." *Riddle*, 523 F.3d at 856.

Applying its rule that Section 2244(d)(1)(A)'s statutory standard allows consideration of the State's definition of when its own review process concludes, the Eighth Circuit then held – in direct opposition to the Fifth Circuit's decisions here and in *Roberts* – that the intermediate court's issuance of its mandate was the functional "conclusion of direct review" under Missouri state law and thus under AEDPA Section 2244(d)(1)(A). *Riddle*, 523 F.3d at 856 (citing Mo. Sup. Ct. R. 30.24(b); Mo. Sup. Ct. Op. R. 8.02(D)(1); and *Payne v. Kemna*, 441 F.3d 570, 572 (8th Cir. 2006)).

The Fifth and Ninth Circuits' law also conflicts with the law of the Eleventh Circuit, as the Fifth Circuit has acknowledged. *Roberts*, 319 F.3d at 694 & n.16. In *Tinker v. Moore*, 255 F.3d 1331 (2001), cert. denied, 534 U.S. 1144 (2002), the Eleventh Circuit explained that, "[u]nder Florida law, a judgment against a criminal defendant becomes final upon issuance of the mandate on his direct appeal." *Id.* at 1333 (citing *Jones v. State*, 602 So. 2d 606, 607-608 (Fla. Ct. App. 1992)). The court accordingly held that the date of the issuance of the mandate also determined the conclusion of direct review for purposes of Section 2244(d)(1)(A). 255 F.3d at 1333 ("Tinker's mandate issued on February

14, 1997, and thus he had until February 13, 1998, to file his § 2254 petition.").

The law of the Seventh Circuit accords with that of the Eighth and Eleventh Circuits. *See Balsewicz v. Kingston*, 425 F.3d 1029, 1032 (7th Cir. 2005), cert. denied, 546 U.S. 1144 (2006) (enforcing under Section 2244(d)(1)(A) the rule that, "[i]n Wisconsin, a direct challenge to a conviction becomes 'final' the day the Remittitur issues,'" and measuring the timeliness of the habeas petition from that date); *cf. Frasch v. Peguese*, 414 F.3d 518 , 522 (5th Cir. 2005) ("To determine what constitutes 'direct review' for purposes of 2244(d)(1)(A), we look to state (Maryland) law.").

3. That conflict in the circuits is widespread, encompassing five different federal courts of appeals. And it is entrenched, with the Fifth Circuit having expressly reaffirmed its contrary rule of law despite the acknowledged circuit conflicts and the Eighth Circuit's consideration of the issue en banc. Furthermore, the importance and frequent recurrence of the question presented is underscored by both the number of appellate decisions presenting the question and the Eighth Circuit's recognition that en banc consideration of the question was warranted.

The conflict in the law, moreover, is outcome determinative. Had Gonzalez's case arisen in the Seventh, Eighth, or Eleventh Circuits, his habeas petition would have been deemed timely. But, because circuit geography placed him within the Fifth Circuit, his petition

was deemed untimely and his opportunity for review through the Great Writ has been lost.

No such widespread disuniformity for both prisoners and States should exist under AEDPA. That Act's goals of obtaining stability, consistency, and reliable rules of finality for state-law convictions – purposes that are just as important for States as they are for prisoners – are confounded when AEDPA's provisions are applied disparately solely because of the disagreements of federal courts.[3] This Court's review is the only mechanism for resolving the conflict and affording AEDPA the consistent interpretation that Congress intended and principles of federalism and evenhandedness require.

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[3] Unlike the Fifth Circuit, this Court has frequently held that AEDPA respects and preserves the role of state law in its operation, especially in determining the finality of state convictions. *See, e.g., Carey*, 536 U.S. at 220, 223, 226 (State's determination that a state habeas petition was untimely was conclusive for purposes of determining whether the petition was "properly filed" within the meaning of AEDPA's tolling provision; "Ordinarily, for purposes of applying federal statute that interacts with state procedural rules, we look to how a state procedure functions."); *Evans v. Chavis*, 546 U.S. 189, -197-198 (2006) (state law controls in determining when an application for state collateral review was "properly filed" under Section 2244(d)(2)'s tolling provision).

B. The Fifth Circuit's Decision Creates A Conflict In What Finality Rule Applies

Even if the Fifth Circuit were correct that Section 2244(d)(1)(A) imposes a single federal definition of finality for all State direct appeal processes, the federal circuits would still be left with conflicting measures of finality.

As noted, the Fifth Circuit has determined that the "conclusion" of a direct appeal that terminates at the intermediate appellate stage necessarily occurs "when the time for seeking further direct review in the state court expires." App., *infra*, 4a (citing *Roberts*, 319 F.3d at 694). *See also Wesley v. Snedeker*, 159 Fed. App'x 872, 873 (10th Cir. 2005) (unpub. mem.) (treating the expiration of time for seeking review by the state's highest court as the date on which direct review concluded).

The Ninth Circuit in *Wixom* held that, when further discretionary review was not sought within the state court system, the direct review process concluded on the date that the intermediate appellate court decision issued – not the date that the opportunity for further review expired or the date that the mandate issued. 264 F.3d at 897-898 (date of appellate court's "denial of his appeal" marked the "conclusion" of direct review).[4]

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[4] To be sure, the Ninth Circuit ultimately ruled that, under Section 2244(d)(1)(A)'s second clause, finality attached after the expiration of Wixom's time to seek

As the Fifth Circuit acknowledged here, however, App., *infra* 7a, the Eighth Circuit invoked the appellate court's issuance of its mandate as the trigger for finality in *Riddle v. Kemna*, *supra*. In so doing, the Eighth Circuit relied not only on Missouri law, but on this Court's decision in *Lawrence v. Florida*, 549 U.S. 327 (2007), which referred "five times to the issuance of the mandate by [the] state court as the 'final judgment'" for purposes of AEDPA Section 2244(d). *Riddle*, 523 F.3d at 856; *see also Lawrence*, 549 U.S. at 330-332. *See also Brown v. Milyard*, 373 Fed. App'x 853, 853-855 (10th Cir. 2010) (unpubl. mem.) (relying upon state court issuance of mandate as the date that direct review concluded), cert. denied, 131 S. Ct. 532 (2010)..

If AEDPA imposes a uniform federal date for when State direct-review processes terminate at the intermediate-appellate level, then there should be only one such date, not the three different measures currently enforced by different courts of appeals. If one uniform federal date is to control, then this Court's review is necessary to resolve the conflicting decisions and determine what date Congress intended

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discretionary review in the state supreme court. 264 F.3d at 898. The Fifth Circuit rule, however, collapses those two inquiries by making the end of direct review the same as the expiration of the time period for appeal.

C. The Fifth Circuit Has Expanded A Widespread Conflict Over Whether The Certiorari Timeframe Applies To State Prisoners Who Forgo Discretionary Review In Their State's Highest Court

1. The inter-circuit conflicts embodied in the Fifth Circuit's decision extend still further. In calculating when Gonzalez's time for seeking direct review expired under Section 2244(d)(1)(A)'s second clause, the Fifth Circuit – based on its prior decision in *Roberts*, 319 F.3d at 693-95 & n.14 – omitted the ninety-day time period in which Gonzalez could have sought certiorari review in this Court. The Fifth Circuit instead counted only the shorter thirty-day time period for seeking review in the Texas Court of Criminal Appeals. App., *infra*, 4a. While that decision is in accord with the law of two other circuits, two additional circuits have held the opposite. And the Eleventh Circuit is on both sides of the conflict.

As a general rule, under 28 U.S.C. § 1257(a) and this Court's Rules 10(a), (b), & 13.1, certiorari review can only be sought from a "state court of last resort," not intermediate appellate courts. There are, however, exceptions to that rule, including when there is a statutory or constitutional bar to higher review. *See, e.g.*, *Brown v. Texas*, 443 U.S. 47, 50 (1979); *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 237 & n.1 (1967) (requirement does not apply when higher court "apparently"

lacked jurisdiction); *Metlakatla Indian Cmty. Annette Island R. v. Egan*, 363 U.S. 555, 559-560 (1960) (higher court not functioning).

The Fourth and Seventh Circuits, and one panel of the Eleventh Circuit, have held that Section 2244(d)(1)(A)'s calculation of the "expiration of the time for seeking such [direct] review" includes the ninety-day period following the appellate court's decision in which the defendant could have filed a certiorari petition with this Court, regardless of whether the defendant sought discretionary review from the State's highest court. That is because "the one-year limitation of § 2244(d)(1)(A) is concerned solely with the question of time, not with whether a defendant's appeal qualifies on the merits for review by the Supreme Court." *Nix v. Secretary for the Dep't of Corr.*, 393 F.3d 1235, 1237 (11th Cir. 2004) cert. denied, 545 U.S. 1114 (2005).

In *Balsewicz v. Kingston*, *supra*, the Seventh Circuit held that, even though Balsewicz never sought discretionary review of his judgment of conviction in the Wisconsin Supreme Court, the ninety days in which he could have filed a petition for certiorari with this Court must be included before his conviction became final under Section 2244(d)(1)(A), 425 F.3d at 1032. In so holding, the Seventh Circuit relied on this Court's decision in *Bell v. Maryland*, 378 U.S. 226 (1964), under which, "[w]ithout question, review of a state criminal conviction by the United States Supreme Court is considered

'direct review' of that conviction," *Anderson v. Litscher*, 281 F.3d 672, 674-675 (7th Cir. 2002) (cited in *Balsewicz*, 425 F.3d at 1032). "Because the plain terms of section 2244 include the period for seeking direct review, regardless of whether or not a petitioner chooses to avail himself or herself of that opportunity," the *Anderson* court reasoned, "the ninety day period during which a petition for certiorari may be filed by a state prisoner falls within the meaning of section 2244(d)(1)(A)." 281 F.3d at 674-675.

The Fourth Circuit ruled likewise in *Hill v. Braxton*, 277 F.3d 701 (2002). "If no petition for a writ of certiorari is filed in the United States Supreme Court, then the limitation period begins running when the time for doing so – 90 days – has elapsed," *id.* at 704, notwithstanding the defendant' failure to seek review in the State's highest court, *id.* at 703.

2. The law in the Fifth Circuit is the opposite, *see Roberts*, 319 F.3d at 693-695 & n.14 (citing this Court's Rules 10(b), 6 & 13), and the court accordingly omitted that ninety-day period when computing the timeliness of Gonzalez's habeas petition, App, *infra*, 4a.

The Eighth Circuit agrees, as has a different panel of the Eleventh Circuit.

In *Riddle*, *supra*, the Eighth Circuit acknowledged the circuit split on the issue, 523 F.3d at 855, and held that the petitioner was not entitled to include the ninety-day certiorari timeframe in computing when his opportunity to seek direct review expired under Section

2244(d)(1)(A). The court reasoned that, "because the United States Supreme Court could not have reviewed Riddle's direct appeal, 'the expiration of the time for seeking [direct] review' does not include the ninety-day period for filing for certiorari." *Ibid.*

A different panel of the Eleventh Circuit similarly has ruled that, "[b]ecause Pugh was not entitled to petition the Supreme Court of the United States for a writ of certiorari," due to his failure to seek discretionary review from the State's highest court, the ninety-day period for certiorari would not be included in determining when the period for seeking direct review expired under Section 2244(d)(1)(A). *Pugh v. Smith*, 465 F.3d 1295, 1299-1300 (11th Cir. 2006). *See also Wesley*, 159 Fed. Appx. at 873-874 ("[I]t would be anomalous to extend the limitation period by 90-days * * * to allow for the potential of a certiorari petition before the United States Supreme Court when the defendant failed to seek discretionary review from the state's highest court.").

3. Given the breadth of the circuit conflict and the common recurrence of this question in the federal circuit courts, as well as its central importance to the stable and evenhanded application of federal law governing access to habeas corpus, this Court's review is warranted to eliminate the conflict. *See* Means, *supra* (documenting the circuit conflict). Only this Court's review can bring the needed coherence and consistency in AEDPA law.

II. THE FIFTH CIRCUIT'S RULING IS ERRONEOUS.

Review is also warranted because the Fifth Circuit is on the wrong end of all three circuit splits.

First, with respect to whether state law is relevant to determining whether Section 2244(d)(1)(A)'s "conclusion of direct review" prong is satisfied, the Fifth Circuit's decision disregards this Court's decision in *Jimenez v. Quarterman*, *supra*, and overreads *Clay v. United States*, *supra*.

Implicit in this Court's decision in *Jimenez v. Quarterman* was the principle that federal courts must respect developments in state court review in determining when a conviction becomes final by the "conclusion of direct review" under Section 2244(d)(1)(A). In *Jimenez*, this Court noted that, while the language of Section 2244(d)(1)(A) "pinpoints" a "uniform date of finality set by Congress," that uniform date was "the conclusion of direct appellate proceedings in the state court," and the Court then included a state court ruling reopening *post hoc* the direct review process. 129 S. Ct. at 686. Rather than enforce a wooden federal rule of finality, this Court's decision respected and found dispositive in applying Section 2244(d)(1)(A)'s standard the moment of finality prescribed – in fact, created – by a unique state court ruling. *Ibid.*

To hold that state law is irrelevant, moreover, would deprive many prisoners of the full one-year period in which to seek federal

habeas review that Congress specifically afforded them in AEDPA. That is because, in many States (like Texas), a prisoner cannot initiate the state's post-conviction review procedure until after his conviction becomes "final" under state law. Tex. R. Crim. P. 11.07 § (3).[5] If finality under Section 2244(d)(1)(A) is universalized under AEDPA and the chosen federal rule precedes when State law considers the conviction "final" – as occurred in this case – the AEDPA statute of limitations will start to run for prisoners before they can even initiate state remedies.[6] Given that, in each of the States listed in footnote 2, *supra*, the mandate (or analogous process) will issue well after the actual decision is reached – and in eleven states, would likely issue after the time for seeking further review has expired – the time lost could be substantial.[7]

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[5] *See also, e.g.*, Ala. R. Crim. P. 32.2(c)(1)) (petitions for post-conviction relief must be brought within one year of the issuance of the certificate of judgment by the Court of Criminal Appeals); *Jones v. Florida*, 602 So. 2d 606, 607-08 (Fla. Ct. App. 1992) ("[A] judgment and sentence become final for purposes of filing a motion for post-conviction relief when appellate proceedings have concluded, *i.e.*, upon issuance of the mandate").

[6] In this case, there was a forty-six-day differential under Texas law between the time for seeking discretionary review and issuance of the mandate. App., *infra*, 2a-4a.

[7] The following States have post-conviction review statutes that measure finality from issuance of the mandate or similar procedure, and potentially allow more time for issuance of the mandate than time for

That risk is especially acute in those States that impose no time limit upon the appellate court's issuance of its mandate,[8] and in virtually every State, where the issuance of the

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seeking further review. *Compare* Ala. R. App. P. 39(b)(3) & 41(a) (18 days for issuance of certificate of judgment, 14 days to seek certiorari); Del. Sup. Ct. R. 19(a) (no specific time period for mandate); Fla. R. App. P. 9.340(a) (mandate may issue anytime after expiration of fifteen days after judgment); Idaho R. App. P. 38(b) & (c) (mandate shall issue *no earlier* than twenty-one days after opinion); *compare* Mass. R. App. P. 23 & 27.1(a) (requiring issuance of the rescript twenty-eight days after the opinion, but appeal to the Supreme Judicial Court within twenty days of opinion); Miss. R. App. P. 17(b) & 41(b) (requiring certiorari petition to be filed fourteen days after mandatory rehearing motion, but mandate shall issue twenty-one days after rehearing); Mo. Sup. Ct. R. 30.24(b) (imposing no time limit on issuance of mandate); Neb. Ct. R. App. P. § 2-114(A)(1) (setting no strict time for issuance of mandate, but prohibiting it from issuing *before* expiration of the period for seeking highest court review); N.M. R. App. P. 12-402(C)(providing no definite time for issuance of the mandate, but requiring that it shall not issue before the time for seeking certiorari in the state's highest court expires); S.C. R. App. Prac. 221(b) (allowing issuance of remittitur anytime after fifteen days have expired following the judgment); Wis. Stat. Ann. § 809.26(1) (2010) (allowing issuance of remittitur any time after the expiration of thirty-one days from judgment).

[8] *See, supra*, n.6. *See also* Del. R. Sup. Ct. 19(a); Fl. R. App. P. 9.340(a); Idaho R. App. P. 38(b) & (c); Mo. Sup. Ct. R. 30.24(b); Neb. Ct. R. App. P. § 2-114(A)(1); N.M. R. App. P. 12-402(C); S.C. R. App. Prac. 221(b); Wis. Stat. Ann. § 809.26(1).

mandate can be delayed by the filing of rehearing or reconsideration requests.[9]

To be sure, in *Clay*, this Court noted that Section 2244(d)(1)(A) prescribes a "uniform" statutory rule of finality. 537 U.S. at 531. But that decision said nothing about the role of state law in determining when that federal statutory standard is satisfied. In any event, to the extent there is tension between *Clay* and *Jimenez*, that would simply strengthen the need for this Court's review, because only this Court can determine definitively the interplay of its own prior decisions.

Second, with respect to the question of what the uniform federal rule should be (assuming there is one), the Fifth Circuit's holding that the appellate court's issuance of its mandate cannot mark the finality of direct review under Section 2244(d)(1)(A) is, as the Eighth Circuit explained in *Riddle*, 523 F.3d at 856, in substantial tension with this Court's decision in *Lawrence v. Florida*, which repeatedly referred to and then enforced the issuance of the mandate as the date on which

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[9] *See, e.g.*, Ala. R. App. P. 41(a)(1) (permitting the certificate of judgment to be stayed by timely filing of an application for rehearing); Ariz. R. Crim. P. 31.23(a)(2) (allowing the issuance of the mandate to be delayed by a motion for reconsideration); Del. R. Sup. Ct. 19(a) (permitting stay of the mandate for motion for reargument or motion for rehearing en Banc, and delaying issuance until time for filing such motions has expired).

appellate review concluded in that case for purposes of AEDPA. 549 U.S. at 330-332. *See also Holland v. Florida*, 130 S. Ct. 2549, 2556 (2010) ("on December 1, 2005, the court issued its mandate, making its decision final" for the purposes of Section 2244(d)(2)'s statutory tolling provision) (emphasis omitted).[10]

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[10] In addition, the courts of appeals uniformly measure the finality of appellate court decisions in relation to the mandate when calculating the seventy-day deadline under the Speedy Trial Act, 18 U.S.C. § 3161(d)(2),(e). *See, e.g., United States v. Kington*, 875 F.2d 1091, 1109 (5th Cir. 1989) ("[A]n appellate disposition occasioning a retrial *becomes final* on the date when the appellate court issues its mandate.") (emphasis added); *United States v. Rivera*, 844 F.2d 916, 920 (2d Cir. 1988) ("[A]n appeal *becomes final* on the date the mandate is issued.") (emphasis added); *United States v. Felton*, 811 F.2d 190, 198 (3d Cir. 1987) (en banc) ("The action of a court of appeals does not become final until its mandate is issued * * * * [W]e agree with the district court that the language of the statute ('the date the action ... becomes final') requires that the date of issuance [of the mandate] be the point of departure."); *United States v. Robertson*, 810 F.2d 254, 259 & n.6 (D.C. Cir. 1987); *United States v. Scalf*, 760 F.2d 1057, 1059 (10th Cir. 1985); *United States v. Ross*, 654 F.2d 612, 616 (9th Cir. 1981); *see also United States v. Cheek*, 3 F.3d 1057, 1065 (7th Cir. 1993). At least three circuit courts have varied this rule slightly, measuring finality from *receipt* of the mandate in the lower court, rather than issuance, but they nevertheless treat the mandate as the relevant measure of finality. *See United States v. Long*, 900 F.2d 1270, 1276-1277 (8th Cir. 1990); *United States v. Lasteed*, 832 F.2d 1240, 1243 (11th Cir. 1987), cert. denied, 485 U.S. 1022 (1988); *United States v. Ferris*, 751 F.2d 436, 438-

Third, and finally, extensive precedent from this Court has included the ninety-day certiorari timeframe in defining when the time for seeking direct review expires in criminal cases, without regard to the merits of such a certiorari petition. See *Bell*, 378 U.S. at 232 (noting that review by the United States Supreme Court is included in the "direct review" of a state decision); *Griffith v. Kentucky*, 479 U.S. 314, 320-321 (1987) ("direct review" included Griffith's petition for a writ of certiorari). When Congress incorporated the term "direct review" in Section 2244(d)(1)(A), that phrase presumptively carried forward this Court's settled precedent. *See Clay*, 537 U.S. at 527-528 (Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents.") (quoting *United States v. Wells*, 519 U.S. 482, 495 (1997)).

As a result, while the States' direct review processes can be expected to "conclu[de]" short of review by this Court, whenever the conviction becomes final under state law, Section 2244(d)(1)(A)'s separate clause concerning the "expiration of the time for seeking [direct] review" cannot occur until the time periods for pursuing all remaining direct appeals – either further state appeals *or* certiorari review – have expired. *Cf. Clay*, 537 U.S. at 530 (noting, in interpreting 28 U.S.C. § 2255(f)(1) as automatically including the

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439 (1st Cir. 1984); *see also United States v. Staton*, 94 F.3d 643, *3 (4th Cir. 1996) (unpublished per curiam).

ninety-day certiorari period, that the former provision was "no less broad" than Section 2244(d)(1)(A)). By ignoring the natural import of the term "direct review" and excluding the period for seeking certiorari from its calculation of the "expiration of the time for seeking [direct] review," the Fifth Circuit ignored not only the contrary decisions of its sister Circuits, but also the straightforward text of Section 2244(d)(1)(A) and the extensive teachings of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Table of Contents

United States Court of Appeals for the Fifth Circuit Opinion (October 6, 2010) 1a

United States District Court for the Northern District of Texas Order (August 20, 2008) 9a

Findings, Conclusions, and Recommendation of the United States Magistrate Judge (July 18, 2008) 11a

28 USC § 2244(d) 22a

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10871

RAFAEL ARRIAZA GONZALEZ,

Petitioner – Appellant

v.

RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent – Appellee

Appeal from the United States District Court for the Northern District of Texas

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Before HIGGINBOTHAM, CLEMENT, and OWEN, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Petitioner-appellant Rafael Gonzalez appeals the district court's dismissal of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The district court held that Gonzalez's petition was time-barred under 28 U.S.C. § 2244(d)(1) because he failed to file his petition within one year of the expiration of his time to appeal his intermediate state appellate court judgment to the Texas Court of

Criminal Appeals. We affirm.

FACTS AND PROCEEDINGS

On July 14, 2005, Gonzalez was convicted of murder and sentenced to thirty years in prison. Gonzalez appealed his conviction to the Texas Court of Appeals, which affirmed his conviction on July 12, 2006. *See Gonzales v. State*, No. 05-05-01140-CR, 2006 WL 1900888 (Tex. App. July 12, 2006). Gonzalez did not file a petition for discretionary review to the Texas Court of Criminal Appeals within the thirty days allowed by the Texas Appellate Rules. *See* TEX. R. APP. P. 68.2(a). Gonzalez's period for discretionary review expired on August 11, 2006. On September 26, 2006, the mandate was issued in his case.

On February 8, 2007, Gonzalez filed for a writ of habeas corpus in the Texas Court of Criminal Appeals, which dismissed his application on April 11, 2007, for failure to comply with the Texas Appellate Rules. On July 19, 2007, Gonzalez filed for a second state writ of habeas corpus, which was denied on November 21, 2007.

On January 24, 2008, Gonzalez filed a petition for a writ of habeas corpus in the district court under 28 U.S.C. § 2254. A magistrate judge recommended that the district court dismiss Gonzalez's petition as time-barred because he had failed to comply with the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Citing to this court's decision in *Roberts v. Cockrell*, 319 F.3d 690, 694-95 (5th Cir. 2003), the magistrate judge calculated Gonzalez's one-year period beginning from the date Gonzalez could no longer

petition for discretionary review to the Texas Court of Criminal Appeals, August 11, 2006. Gonzalez objected to the magistrate judge's report and recommendation, arguing that the magistrate judge should have calculated the one-year period from that the [sic] date the mandate was issued instead of the date his right to petition for discretionary review expired. The district court overruled Gonzalez's objections, adopted the magistrate's recommendations, and dismissed Gonzalez's petition as time-barred.

Gonzalez appealed, and we granted a certificate of appealability (COA) on the question of "whether *Roberts* has been overruled by *Lawrence* [*v. Florida*, 549 U.S. 327, 331-35 (2007)] and, if so, whether [Gonzalez's] habeas application was timely filed."[1]

STANDARD OF REVIEW AND APPLICABLE LAW

We review the denial of a federal habeas petition on procedural grounds *de novo*. *Roberts*, 319 F.3d at 693.

DISCUSSION

Under the AEDPA, Gonzalez had one year to timely file his petition, beginning on "the date on which the judgment became final by the conclusion of

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[1] Gonzalez also argues that: (1) his right to a speedy trial was violated; (2) his trial counsel was ineffective; (3) the trial court admitted tainted evidence and faulty witness statements into evidence; and (4) the state violated his due process rights by refusing to give him copies of the clerk's and reporter's records. Because COAs were not granted on these issues, we lack jurisdiction to consider these claims. *Carty v. Thaler*, 583 F.3d 244, 266 (5th Cir. 2009); 28 U.S.C. § 2253(c).

direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A) (2010). Gonzalez's appeal centers on when his conviction became "final" and triggered his limitations period.

In *Roberts*, we held that the issuance of a mandate by a state court is irrelevant to determining when a judgment becomes "final" for the purposes of § 2244(d)(1)(A). *Roberts*, 319 F.3d at 694-95. Instead, because a conviction becomes final "by the conclusion of direct review or the expiration of the time for seeking such review," the one-year limitations period for a petitioner that does not appeal to the state court of last resort begins "when the time for seeking further direct review in the state court expires." *Id.* at 694 (quoting § 2244(d)(1)(A)).

Gonzalez's "time for seeking further direct review in the state court" expired on August 11, 2006, the last date under the Texas Appellate Rules that he could petition for discretionary review of his judgment. *Id.*; *see* TEX. R. APP. P. 68.2(a). Under *Roberts*, Gonzalez's AEDPA limitations period therefore began on August 12, 2006, the day after his conviction become final. *See Flanagan v. Johnson*, 154 F.3d 196, 202 (5th Cir. 1998) (applying FED. R. CIV. P. 6(a) to AEDPA calculation).

Three hundred forty-two days of the limitations period elapsed before Gonzalez filed his second state habeas petition.[2] Because "[t]he time during which a

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[2] Gonzalez's first state habeas petition did not toll the limitations period because it was not "properly filed" as required by the Texas Appellate Rules and, by extension, § 2244(d)(2). *See Artuz v. Bennet*, 531 U.S. 4, 8 (2000) (holding that an application is "properly filed" under when "its delivery and acceptance are in compliance with the applicable laws and

properly filed application for State post-conviction . . . review with respect to the pertinent judgment . . . is pending shall not be counted toward any period of limitation," the limitations period was tolled for the 125 days between July 20 and November 21, 2007. 28 U.S.C. § 2244(d)(2). The one-year limitations period resumed running on November 22, 2007, and under *Roberts*, expired on December 17, 2007. Gonzalez filed his federal habeas petition on January 24, 2008. Applying the undisputed facts to the current circuit rule, Gonzalez's federal habeas petition was time-barred by the AEDPA's one-year limitations period.

Gonzalez argues the Supreme Court overruled *Roberts* in *Lawrence* and thus his conviction became "final" for the purposes of § 2244(d)(1)(A) when the state appellate court issued its mandate on September 26, 2006. Excluding the same 125 days for the properly filed state habeas petition, Gonzalez's one-year limitations period would therefore extend to January 30, 2008, and his federal habeas petition would not be time-barred by the AEDPA.

In *Lawrence*, the issue before the Court was "whether the [AEDPA] limitations period was . . . tolled [under § 2244(d)(2)] during the pendency of Lawrence's petition for certiorari to [the Supreme] Court seeking review of the denial of state postconviction relief." 549 U.S. at 331. The Court held that the statute of limitations was only tolled while the state courts reviewed the application because, "[a]fter the State's highest court has issued

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rules governing filings").

its mandate or denied review, no other state avenues for relief remain open," and the petition was therefore not "*State* post-conviction or other collateral review" required by § 2244(d)(2). *Id.* at 332 (emphasis in original).

We hold that the Supreme Court did not overrule *Roberts* in *Lawrence*. First, and most importantly, the Court was interpreting the AEDPA's tolling provision, § 2244(d)(2), not its triggering provision, § 2244(d)(1), in *Lawrence*. *Id.* at 332. Furthermore, although the Court references the "State court's mandate" in *Lawrence*, the references were to the State court's mandate denying the prisoner's state post-conviction habeas petition, not the mandate affirming his original conviction. *Id.* at 330-32. It is unlikely that the Court intended to implicitly hold that a state conviction is "final" under § 2244(d)(1) when the mandate issues while discussing the finality of a state habeas claim in the context of a different statutory component of the AEDPA.

Additionally, we believe that *Lawrence* did not overrule *Roberts* because the resulting interpretation would be contrary to the plain language of the statute. Under the AEDPA, the limitations period can begin on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). For petitioners such as Gonzalez who do not exhaust their state court rights, the "expiration of the time for seeking [direct] review" is clearly when the petitioner can no longer timely file for further state court review, not when the mandate issues. The Supreme Court recently reached a similar conclusion in *Jimenez v.*

Quarterman, concluding that state judgments were "final" under § 2244(d)(1) when the time for filing a petition for certiorari expires because that "comport[ed] with the most natural reading of the statutory text." 129 S. Ct. 681, 685 (2009). Notably, the Court did not mention the state court's issuance of the mandate after the time for filing a petition for certiorari expires.[3]

The Eighth Circuit has recently relied on *Lawrence* to support its conclusion that a conviction becomes final for the purposes of § 2244(d)(1)(A) when the state court issues its mandate. *Riddle v. Kemna*, 523 F.3d 850, 855-56 (8th Cir. 2008) (en banc). *Riddle* is unpersuasive for two reasons. First, the Eighth Circuit cited *Lawrence* to support *Payne v. Kemna*, a prior Eighth Circuit decision where it held that the state court mandate triggers the AEDPA statute of limitations. *See Payne v. Kemna*, 441 F.3d 570, 572 (8th Cir. 2006). *Payne* based its holding primarily on Missouri state court decisions holding that an appeal is not final until the mandate has issued. *Id.* (citing *Williams v. Blumer*, 763 S.W.2d 242, 245 (Mo. Ct. App. 1988)). But the Supreme Court has held that the phrase "'by the conclusion of direct review or the expiration of the time for seeking such review' make[s] it clear that finality for the

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[3] Gonzalez's theory would also result in different definitions of when a conviction was final depending on what point a petitioner ends direct review. Under his theory, the issuance of the mandate would begin his one-year limitations period if he failed to appeal to the Texas Court of Appeals or the Texas Court of Criminal Appeals. But, if he failed to appeal to the United States Supreme Court, the end of the period for filing a petition for certiorari would begin his one-year limitations period. *Jimenez*, 129 S. Ct. at 685.

purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule." *Clay v. United States*, 537 U.S. 522, 531 (2003). The Eighth Circuit's holdings in *Payne* and *Kemna* violate this principle by relying on state court definitions to determine finality under § 2244(d)(1). Second, the court in *Riddle* failed to analyze the Court's holding in *Lawrence*, limiting its discussion to a parenthetical statement that the "Court refer[red] five times to the issuance of the mandate by state court as the 'final judgment.'" *Riddle*, 523 F.3d at 856.

"[F]or a panel of this court to overrule a prior decision, we have required a Supreme Court decision that . . . establishes a rule of law inconsistent with our own." *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1103 (5th Cir. 1997) (*overruled in part on other grounds by Okpalobi v. Foster*, 224 F.3d 405 (5th Cir. 2001)). Because the Court's decision in *Lawrence* is not inconsistent with our prior decision in *Roberts*, we hold that *Roberts* remains good law in this circuit. Under the AEDPA, a state conviction for a petitioner who does not appeal to the state court of last resort becomes final "when the time for seeking further direct review in the state court expires," not when the mandate issues in his case. *Roberts*, 319 F.3d at 695. Gonzalez's habeas petition is barred by the AEDPA's one-year statute of limitations.

CONCLUSION

For the above reasons, the judgment of the district court is AFFIRMED.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RAFAEL ARRIAZA GONZALEZ,	§	
	§	
Petitioner,	§	
	§	Civil Action
VS.	§	No. 3:08-CV-0151D
	§	
NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
	§	
	§	
	§	
Respondent.	§	

ORDER

After making an independent review of the pleadings, files, and records in this case, and the findings, conclusions, and recommendation of the magistrate judge, the court concludes that the findings and conclusions are correct. It is therefore ordered that the findings, conclusions, and recommendation of the magistrate judge are adopted.*

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* The magistrate judge's findings, conclusions, and recommendation are somewhat imprecise when stating at page 2 that petitioner filed his second habeas petition on July 2, 2007. As the magistrate judge later explains at page 5 and note 4, the petition was filed July 19, 2007, and the result is the same

One argument that petitioner makes in his objections merits a specific response. He complains that had he filed a state habeas petition before the mandate issued in connection with the affirmance on his direct appeal, the petition would have been subject to dismissal. But as the magistrate judge correctly explains, the AEDPA calculation is not based on the date the mandate issued. And even if petitioner had desired to await the issuance of the mandate before filing a state habeas petition that would toll the running of the AEDPA limitations period, he still had ample time to do so. But despite the fact that the mandate issued on September 26, 2006, petitioner did not file his first (and procedurally defective) state habeas petition until February 8, 2007.

Accordingly, the magistrate judge's findings, conclusions, and recommendation correctly recommend that this federal petition be dismissed with prejudice as time-barred under AEDPA.

SO ORDERED.

August 20, 2008.

SIDNEY A. FITZWATER
CHIEF JUDGE

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regardless which date is used.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RAFAEL ARRIAZA GONZALEZ, aka Rafael Arriaza Gonzales, #1316090, Petitioner,[1]	)	
v.	)	3:08-CV-0151-D
NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. §636(b), and an order of the District Court in implementation thereof, this case has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge are as follows:

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[1] A review of the state court record and state court websites reflects that Petitioner is also known as Rafael Arriaza Gonzales.

FINDINGS AND CONCLUSIONS:

Type Case: This is a *pro se* petition for a writ of habeas corpus brought by a state inmate pursuant to 28 U.S.C. § 2254.

Parties: Petitioner is presently confined at the Lynaugh Unit of the Texas Department of Criminal Justice – Correctional Institutions Division (TDCJ-CID) in Fort Stockton, Texas. Respondent is the Director of TDCJ-CID. The court issued process in this case.

Statement of Case: Following his plea of not guilty, a jury convicted Petitioner of murder and assessed punishment at 30 years imprisonment. *State v. Gonzalez*, No. F01-01091-TR (265th Judicial District Court, Dallas County, Jul. 14, 2005). The court of appeals affirmed his conviction and sentence. *Gonzalez v. State*, No. 05-05-01140-CR (Tex. App. – Dallas, Jul. 12, 2006, no pet.). Petitioner did not file a petition for discretionary review.

Subsequently, Petitioner filed two state habeas applications, pursuant to art. 11.07, Texas Code of Criminal Procedure – the first on February 8, 2007, and the second on July 2, 2007. The Texas Court of Criminal Appeals (TCCA) dismissed the first application as non-complying on April 11, 2007. *Ex parte Gonzalez*, WR-67,256-01, http://www.cca.courts.state.tx.us/opinions/Case.asp?Filing ID=250895. On November 21, 2007, the TCCA denied the properly-filed, second application without written order on the trial court's findings without a hearing. *Ex parte Gonzalez*, WR-67,256-02, http://www.cca.courts.state.tx.us/opinions/Case.asp?

Filing ID=255364.

Petitioner filed this federal petition, challenging his conviction and sentence alleging speedy trial violations, that tainted evidence was admitted, denial of the clerk and reporter's record and a violation of his right to remain silent.[2]

In response to this court's order to show cause, Respondent filed an answer asserting the petition is barred by the one-year statute of limitations. Alternatively, Respondent argues the petition is unexhausted and procedurally barred in part, and otherwise meritless. Petitioner filed a reply to Respondent's answer on May 19, 2008.

Findings and Conclusions: The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a one-year statute of limitations for state inmates to seek federal habeas corpus relief. *See* 28 U.S.C. § 2244(d).

The one-year period is calculated from the latest of either (A) the date on which the judgment of

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[2] Pursuant to *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998), a federal petition is deemed filed for determining application of the AEDPA when the prisoner tenders it to prison officials for mailing. Here Petitioner failed to include the date on which he signed his petition. (*See* Pet. at 9, which is neither signed nor dated, and attached Memorandum at 7, which is signed but not dated). He did sign and date his motion for trial court record, submitted along with his habeas petition, on January 24, 2008. (*See* Mot. for Trial Court Record at 2). The mail logs from the Lynaugh Unit also reflect January 24, 2008, as the earliest possible date on which Petitioner could have mailed his federal petition. (Respondent's Answer at Exh. A). Therefore, for purposes of this recommendation, the petition is deemed filed on January 24, 2008.

conviction became final; (B) the date on which an impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the Supreme Court initially recognizes a new constitutional right, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the facts supporting the claim became known or could have become known through the exercise of due diligence. *See id.* § 2244(d)(1)(A)-(D).

Petitioner alleges no state-created impediment under 28 U.S.C. § 2244(d)(1)(B) that prevented him from timely raising his grounds for relief. Nor does he base his grounds on any new constitutional right under subparagraph (C). With regard to subparagraph (D), the Court determines that the facts supporting his grounds became known prior to the date on which his conviction became final. Therefore, the court calculates the one-year statute of limitations from the date on which Petitioner's conviction became final at the conclusion of direct review or upon the expiration of the time for seeking such review. *See* 28 U.S.C. § 2244(d)(1)(A).

Since Petitioner did not file a petition for discretionary review (PDR), his conviction became final on Friday August 11, 2006, thirty days after the judgment was affirmed. *See* Tex. R. App. Proc. 68.2(a) (a PDR must be filed within thirty days of either the date on which the judgment is affirmed, or the last timely motion for rehearing is overruled by the court of appeals); *Flores v. Quarterman*, 467 F.3d

484, 485 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2909 (2007) (conviction final thirty days after judgment was affirmed because no PDR). Contrary to Petitioner's assertion, the date of issuance of the mandate (September 26, 2006) does not determine when a conviction becomes final for purposes of the limitations period. *Id.* at 485-86 (citing *Roberts v. Cockrell*, 319 F.3d 690, 694-95 (5th Cir. 2003)(mandate date does not control limitations analysis). Thus, the one-year limitations period began to run on August 12, 2006, the day after Petitioner's conviction became final. *See Flanagan v. Johnson*, 154 F.3d 196, 202 (5th Cir. 1998) (citing Fed. R. Civ. P. 6(a)).[3]

The AEDPA provides that "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

Petitioner filed his first state habeas application on February 8, 2007, approximately five and one-half months after the one-year period began to run. *See Ex. Parte Gonzalez*, No.WR-67,256-01, at 2. The TCCA dismissed that application "for noncompliance with appellate rules" on April 11, 2007. *Id.* at cover. An application is properly filed under § 2244(d)(2) "when its delivery and acceptance are in compliance

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[3] Respondent asserts that Petitioner's conviction became final on Monday August 14, 2006, thirty days after the judgment was affirmed. Even if Petitioner's conviction became final on that date, the petition would still be time barred as set out more fully below.

with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000); *see also Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999) (holding properly filed application is "one that conforms with a state's applicable procedural filing requirements"). Rule 73.1, of the Texas Rules of Appellate Procedure, prescribes the form and its required contents to file for relief under article 11.07 of the Texas Code of Criminal Procedure. *See* Tex. R. App. Proc. 73.1:

Since Petitioner's first state application was dismissed on procedural grounds, it did not comply with State of Texas' procedural requirements for an art. 11.07 application. As such, it did not constitute a properly filed application for purposes of statutory tolling. *See Causey v. Cain*, 450 F.3d 601, 605 n.6 (5th Cir. 2006) (citing *Edwards v. Dretke*, 116 Fed. Appx. 470, 471 (5th Cir. 2004) ("The initial filing of Edwards's state habeas corpus application did not constitute a 'properly filed' application . . . because the Texas Court of Criminal Appeals determined that the application failed to comply with Tex. R. App. P. 73.2.")); *Castro v. Dretke*, 127 Fed. Appx. 739, 2005 WL 1077369, *1 (5th Cir. 2005) (unpublished per curiam) (declining to grant statutory and equitable tolling for the period that his first state habeas application, which was returned to him because it was not on the proper form, was pending; noting that petitioner did not show exceptional circumstances or diligence).

Petitioner properly filed his second state writ on July 19, 2007. *Ex parte Gonzalez*, No. WR-67,252-02,

at 2.[4] As of the date of its filing, 341 days of the one-year limitations period had elapsed. The state application remained pending until its denial on November 21, 2007, during which time the one-year period was tolled pursuant to 28 U.S.C. § 2244(d)(2). *See also Sonnier v. Johnson*, 161 F.3d 941, 944 (5th Cir. 1998); *Fields v. Johnson*, 159 F.3d 914, 916 (5th Cir. 1998). The one-year period resumed running on November 22, 2007, and expired twenty-four days later on December 16, 2007. Because that date fell on a Sunday, the limitations period was extended to the following Monday, December 17, 2007. *See* Fed. R. Civ. P. 6(a); *Flanagan v. Johnson*, 154 F.3d 196, 200-01 (5th Cir. 1998) (applying Rule 6(a)). Petitioner mailed his federal petition on January 24, 2008, thirty-eight days after the one-year period elapsed. Therefore, the federal petition is clearly time barred absent equitable tolling.[5]

"The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *United*

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[4] Respondent states the second writ was filed on July 2, 2007. It is unclear why Respondent relies on that date. Nevertheless, the petition would be time barred even if the court were to rely on that filing date.

[5] This petition would be time barred even if the Court were to rely on the date of signing/mailing of the second art. 11.07 application, July 3, 2007. *Ex parte Gonzalez*, No. WR-67,256-02. Nevertheless the Court notes that the Fifth Circuit Court of Appeals has "decline[d] to extend the mailbox rule to the determination of filing dates for state habeas applications." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir.1999). The proper inquiry is "whether the prisoner is entitled to equitable tolling." *See id.* As set out more fully below, Petitioner cannot meet the strict requirements for equitable tolling in this case.

States v. Patterson, 211 F.3d 927, 930-31 (5th Cir. 2000) (quoting *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998)). In *Lawrence v. Florida*, ___ U.S. ___, 127 S.Ct. 1079, 1085 (2007), the Supreme Court stated that to be entitled to equitable tolling, a petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. "[E]quity is not intended for those who sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999).

In his pleadings, Petitioner relies on his *pro se* status, unfamiliarity with the law, and inability to speak and understand English as bases for equitable tolling. He does not provide any details as to how he filed his pleadings in this case other than for stating that he relies on prison writ writers.

The Fifth Circuit has held that unfamiliarity of the law "due to illiteracy and or any other reason" does not "merit[] equitable tolling." *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999); *see also Felder v. Johnson*, 204 F.3d 168, 172-73 (5th Cir. 2000) (ignorance of law and *pro se* status held insufficient to toll statute of limitations); *United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993) (holding pro se status, illiteracy, deafness, and lack of legal training are not external factors excusing abuse of the writ).

The same holds true with respect to Plaintiff's unfamiliarity with the English language. Inability to speak or read the English language is a disability common to a large number of inmates in the prison system and as such it does not warrant equitable tolling. *See United States v. Posada-Rios*, 2007 WL

2988012, *7, No. H-07-CV-478 (S.D. Tex. 2007); *United States v. Morfin*, 2007 WL 837272, *3, No. 3:06-CV-2410-M (N.D. Tex. 2007); *United States v. Polbo-Torres*, 2005 WL 81725, *2, 3:04cv1541-P (N.D. Tex. 2005); *Zinsou v. Dretke*, 2004 WL 2381243, *1, 4:04-CV-566-A (N.D.Tex. 2004) (adopting recommendation of magistrate judge) (citing *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002)) (the inability to read and speak English is not in itself a sufficient basis for equitable tolling); *United States v. Cordova*, 202 F.3d 283, 1999 WL 1136759 (10th Cir., Dec. 13, 1999) (unpublished opinion) (inability to read and speak English language does not warrant equitable tolling); *United States v. Teshima-Jiminez*, No. CRIM. 97-087, 1999 WL 600326 at *2 (E.D. La. Aug. 5, 1999) ("lack of legal research material and assistance" and "little English spoken" in petitioner's prison not "rare and exceptional circumstances" to justify equitable tolling).

Moreover, this is not a case in which Petitioner pursued "the process with diligence and alacrity." *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000). Petitioner delayed five months and twenty-seven days from the date his conviction became final until he filed the first, non-complying writ. Upon receiving notice of the dismissal of his first writ because of procedural deficiencies, Petitioner did not immediately file his second writ. Rather he waited three months and eight days before even submitting his second, properly filed state writ. Following the denial of the second state writ, he waited an additional two months and three days to file his federal petition.

Petitioner provides no reason for his repeated,

dilatory actions. Unexplained delays generally make the circumstances of a case not extraordinary enough to qualify for equitable tolling. *See Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999) (finding that an unexplained six-month delay after the state court denied the state petition made the circumstances of that case "not extraordinary enough to qualify for equitable tolling under § 2244(d)(1)"); *Basalo v. Cockrell*, 2003 WL 21653864, *4-5 (N.D. Tex., Jul. 21, 2003) (3:02cv596-H) (finding that an unexplained delay of eleven months between the date the conviction became final and the date of filing of the state habeas petition did not warrant equitable tolling), findings, conclusions and recommendation accepted (N.D. Tex., Aug. 1, 2003).

Here Petitioner did not act with reasonable diligence. As noted above, he delayed pursuing relief in the Texas justice system both before as well as after receiving notice that his first writ was deficient.

Moreover, this is not a case in which Petitioner *could not have* filed a timely second 11.07 writ *before* the one-year period expired. He delayed filing his second properly filed art. 11.07 application for more than three months after his initial application was dismissed leaving a mere 24 days remaining before expiration of the one-year period. Further, he waited an additional two months before filing his federal petition. See n. 2, *supra*. "[E]quity is not intended for those who sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999).

In sum, the court concludes that Petitioner did not act with the diligence and alacrity needed for equitable tolling and his petition is time barred.

RECOMMENDATION:

For the foregoing reasons it is recommended that the habeas corpus petition be **DISMISSED** with prejudice as barred by the one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1).

The Clerk will transmit a copy of this recommendation to Petitioner.

Signed this 18th day of July, 2008.

WM. F. SANDERSON, JR.
UNITED STATES
MAGISTRATE JUDGE

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten days after being served with a copy of this recommendation. Pursuant to *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten day period may bar a *de novo* determination by the district judge of any finding of fact or conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

Appendix D

28 U.S.C. § 2244(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

OPPOSITION BRIEF

RECEIVED
AND
BRIEFS

No. 10-895

In The Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ,
Petitioner,

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

28 U.S.C. 2244(d)(1)(A)'s one-year period of limitations for post-conviction habeas corpus petitions begins on "the date on which the judgment became final by the conclusion of direct review *or* the expiration of the time for seeking such review." (Emphasis added).

The question presented is:

When a prisoner declines to seek review in the State's highest court on direct appeal, must section 2244(d)(1)(A)'s limitations period always begin at "the expiration of the time for seeking such review," or must courts also ascertain when "the conclusion of direct review" occurred and start the limitations period on the later of these two dates?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities v

Statement 1

I. Procedural History 1

II. Other Courts of Appeals' Interpretations of 28 U.S.C. 2244(d)(1)(A) 4

Reasons For Denying The Writ 8

I. The Issue Rarely Arises Because Habeas Petitioners Who Fail To Pursue Direct Appeals To The State Supreme Court Will Forfeit Their Claims Under *O'Sullivan* v. *Boerckel* 10

II. The Certificate Of Appealability In This Case Fails To Comply With 28 U.S.C. 2253(c) And *Slack* v. *McDaniel*, Presenting Jurisdictional Hurdles To This Court's Involvement 12

III. If This Court Decides To Grant Certiorari In This Case, It Should Not Extend The Writ To Any Of The Three Questions Presented In Gonzalez's Petition 18

A. "Whether state law is relevant to determining when the States' direct review processes conclude, as the Seventh, Eighth, and Eleventh Circuits have held, or whether AEDPA dictates a single federally prescribed point in time when all state direct-review processes are deemed to have concluded, as the Fifth and Ninth Circuits have held." 19

B. "Whether, under AEDPA, the 'conclusion of direct review' occurs upon (i) issuance of an intermediate appellate court's mandate, as the Eighth Circuit has held, (ii) expiration of the time for seeking discretionary review in the state's highest court, as the Fifth Circuit held, or (iii) issuance of the intermediate appellate court's decision, as the Ninth Circuit has held." 21

C. "Whether 'expiration of the time for seeking [direct] review' under Section 2244(d)(1)(A) includes the ninety-day period for filing a petition for a writ of certiorari with this Court even when the petitioner forewent discretionary review in the state's highest court, as the Fourth and Seventh Circuits have held, or excludes that time, as the Fifth, Eighth, Ninth, and Eleventh Circuits have held." 22

Conclusion 24

TABLE OF AUTHORITIES

Page

Cases

Baldwin v. *Reese*,
541 U.S. 27 (2004) 10

Balsewicz v. *Kingston*,
425 F.3d 1029 (2005) 23

Foreman v. *Dretke*,
383 F.3d 336 (5th Cir. 2004) 6

Gonzalez v. *Thaler*,
623 F.3d 222 (5th Cir. 2010) ..... *passim*

Hemmerle v. *Schriro*,
495 F.3d 1069 (9th Cir. 2007) 8

Hill v. *Braxton*,
277 F.3d 701 (2002) 22, 23

James v. *Giles*,
221 F.3d 1074 (9th Cir. 2000) 16

Lawrence v. *Florida*,
549 U.S. 327 (2007) 3

Miller-El v. *Cockrell*,
537 U.S. 322 (2003) 14

Muniz v. *Johnson*,
114 F.3d 43 (5th Cir. 1997) 15

O'Sullivan v. *Boerckel*,
526 U.S. 838 (1999) 10, 11

Owens v. *Boyd*,
235 F.3d 356 (7th Cir. 2001) 15

Phelps v. *Alameda*,
366 F.3d 722 (9th Cir. 2004) 16

Porterfield v. *Bell*,
258 F.3d 484 (6th Cir. 2001) 16

Pugh v. *Smith*,
465 F.3d 1295 (11th Cir. 2006) 7

Riddle v. *Kemna*,
523 F.3d 850 (8th Cir. 2008) 4, 5

Roberts v. *Cockrell*,
319 F.3d 690 (5th Cir. 2003) 2-4, 6, 22

Slack v. *McDaniel*,
529 U.S. 473 (2000) 3, 9, 13, 14

Soto v. *United States*,
185 F.3d 48 (2d Cir. 1999) 16

Tiedeman v. *Benson*,
122 F.3d 518 (8th Cir. 1997) 15

Tinker v. *Moore*,
255 F.3d 1331 (11th Cir. 2001) 6, 7

United States v. *Cepero*,
224 F.3d 256 (3d Cir. 2000).....15

United States v. *Marcello*,
212 F.3d 1005 (7th Cir. 2000) 16

United States v. *Talk*,
158 F.3d 1064 (10th Cir. 1998) 15

Wixom v. *Washington*,
264 F.3d 894 (9th Cir. 2001) 7, 8

Statutes

28 U.S.C. 2244(d)(1)(A) .....*passim*

28 U.S.C. 2244(d)(2) 2

28 U.S.C. 2253(c) 9, 15

28 U.S.C. 2253(c)(2).....3, 13, 14, 17

28 U.S.C. 2253(c)(3).....13

28 U.S.C. 2254(b).....10, 11

28 U.S.C. 2254(b)(3) 11

Mo. Sup. Ct. R. 83.02 4

Sup. Ct. R. 13.1 23

No. 10-895

In The Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

I. Procedural History

Petitioner Rafael Gonzalez was convicted of murder and appealed his conviction to the Court of Appeals for the Fifth Court of Appeals District of Texas. After that intermediate state appellate court affirmed his conviction, Gonzalez declined to file a petition for discretionary review with the Texas

Court of Criminal Appeals (CCA), the State's highest criminal court. The window for filing that petition with the CCA closed on August 11, 2006. On September 26, 2006, the intermediate appellate court issued its mandate. After Gonzalez exhausted his state post-conviction remedies, he filed a federal habeas petition on January 24, 2008.

The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-year statute of limitations on post-conviction habeas corpus petitions, which starts on "the date on which the judgment became final by the conclusion of direct review *or* the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A) (emphasis added). The district court dismissed Gonzalez's petition as time-barred after concluding that the limitations period began running on August 11, 2006—the date of "the expiration of the time for seeking [direct] review." Had the district court instead started the clock on September 26, 2006, the date on which the state appellate court issued its mandate, Gonzalez's petition would have been timely.[1] But Fifth Circuit precedent holds that in cases where prisoners fail to pursue direct appeals all the way through to the Supreme Court of United States, the one-year clock must start at "the expiration of the time for seeking [direct] review." See *Roberts* v. *Cockrell*, 319 F.3d

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[1] The statute of limitations excludes the time that Gonzalez spent pursuing state post-conviction relief. See 28 U.S.C. 2244(d)(2).

690, 694 (5th Cir. 2003). On this view, the "conclusion of direct review" prong in section 2244(d)(1)(A) can apply only "when the Supreme Court either rejects the petition for certiorari or rules on its merits." *Ibid.* The district court followed *Roberts* and dismissed the petition.

The Fifth Circuit granted a certificate of appealability (COA) on the following question: "[W]hether *Roberts* has been overruled by *Lawrence* [v. *Florida*, 549 U.S. 327 (2007)] and, if so, whether [Gonzalez's] habeas application was timely filed." *Gonzalez* v. *Thaler*, 623 F.3d 222, 225 (5th Cir. 2010). This COA violates 28 U.S.C. 2253(c), as well as this Court's decision in *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000), because it fails to address whether Gonzalez has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also *Slack*, 529 U.S. at 484 (forbidding courts to issue COAs solely on procedural issues, and requiring habeas applicants to identify a substantial showing of the denial of a constitutional right along with the procedural issue that they wish to appeal). Respondent Thaler, however, failed to object to this defective COA, and the Fifth Circuit allowed Gonzalez to appeal without discussing these problems. On the merits, the Fifth Circuit reaffirmed *Roberts*, holding that in cases where petitioners "do not exhaust their state court rights," the one-year limitations period always begins at "the expiration of the time for seeking

[direct] review," rather than at "the conclusion of direct review." *Gonzalez*, 623 F.3d at 225.

II. Other Courts of Appeals' Interpretations of 28 U.S.C. 2244(d)(1)(A).

Although the Fifth Circuit's decision in this case presents one shallow circuit split, it does not implicate any of the "trio of circuit conflicts" that Gonzalez describes in his petition.

The Eighth Circuit's *en banc* opinion in *Riddle* v. *Kemna*, 523 F.3d 850 (8th Cir. 2008), adopts a construction of section 2244(d)(1)(A) that differs from the Fifth Circuit's interpretation. The facts in *Riddle* resemble the facts of this case: the habeas petitioner pursued a direct appeal to Missouri's intermediate appellate court, but never bothered to seek discretionary review in the Missouri Supreme Court. The time for seeking that review expired on February 7, 2001, 15 days after the intermediate appellate court issued its decision. See Mo. Sup. Ct. R. 83.02. But the intermediate appellate court did not issue its mandate until February 15, 2001. Had this case arisen in the Fifth Circuit, *Roberts* would require courts to start the one-year clock on February 7, 2001—the date of "the expiration of the time for seeking [direct] review." Under the Fifth Circuit's interpretation of section 2244(d)(1)(A), the statute provides one starting point for those who pursue their direct appeals all the way to the Supreme Court of the United States ("the conclusion of direct review"), and another for those who

abandon their direct appeals before the Supreme Court rules on their certiorari petition ("the expiration of the time for seeking such review").

But the Eight Circuit's opinion in *Riddle* applies a last-in-time rule to the separate starting points described in section 2244(d)(1)(A), allowing the habeas petitioner to run the one-year clock from the later of "the conclusion of direct review" or "the expiration of the time for seeking such review." As the *Riddle* Court explains:

> "[T]he expiration of the time for seeking [direct] review" occurred when Riddle did not file the first motion to transfer (15 days after the decision by the Missouri Court of Appeals). * * * The AEDPA statute of limitations, however, does not begin then *if* the alternative trigger, "conclusion of direct review," occurs later. In factual situations like the present case, the conclusion of direct review for purposes of § 2244(d)(1)(A) does occur later, when the Missouri Court of Appeals issues its mandate.

Riddle, 523 F.3d at 856.

In the Fifth Circuit, "the conclusion of direct review" can occur only when the Supreme Court of the United States either denies the certiorari petition on direct appeal or rules on its merits. If the petitioner failed to pursue his direct appeals to the Supreme Court of the United States, the "conclusion of direct review" prong is inapplicable,

and habeas courts look *only* to the date of "the expiration of the time for seeking [direct] review" when applying section 2244(d)(1)(A).[2] The Eighth Circuit, by contrast, requires federal habeas courts to determine the date on which "the conclusion of direct review" occurs in *all* cases—including those in which the petitioner aborted his direct appeals before seeking review in the State's highest court. If this postdates the date of "the expiration of the time for seeking [direct] review," then the one-year clock starts on the later of these two dates.

As far as we are aware, only two other circuits have issued holdings on this question.

The Eleventh Circuit has one decision that appears to agree with the Eighth Circuit, and a later ruling that embraces the Fifth Circuit's approach. The first of these cases, *Tinker* v. *Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001), states that section 2244(d)(1)(A)'s limitations period should begin on the date that the intermediate state appellate court issues its mandate, in cases where the prisoner fails to appeal to the state supreme

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[2] Other Fifth Circuit cases have applied *Roberts*'s either-or framework. See, *e.g.*, *Foreman* v. *Dretke*, 383 F.3d 336, 338 (5th Cir. 2004) ("Direct review, which includes a petition for certiorari to the Supreme Court, occurs 'when the Supreme Court either rejects the petition for certiorari or rules on its merits.' * * * If no petition is filed, then we examine the second method of creating finality, 'the expiration of the time for seeking such review.'") (citing *Roberts*, 319 F.3d at 694).

court. *Id.* at 1333 ("Under Florida law, a judgment against a criminal defendant becomes final upon issuance of the mandate on his direct appeal. * * * Tinker's mandate issued on February 14, 1997, and thus he had until February 13, 1998, to file his § 2254 petition, absent tolling of the limitations period."). But *Pugh* v. *Smith*, 465 F.3d 1295, 1299 (11th Cir. 2006), adopts the Fifth Circuit's approach to section 2244(d)(1)(A), without mentioning the earlier decision in *Tinker*:

> If a prisoner petitions the Supreme Court for a writ of certiorari, his conviction becomes final when the Supreme Court denies the petition or affirms the conviction. * * * If he does not petition the Supreme Court, the prisoner's conviction becomes final when the time for filing that petition expires.

Ibid. If we treat the later of these pronouncements as the authoritative view of the Eleventh Circuit, then the Eleventh Circuit is aligned with the Fifth, but it is more precise to characterize the Eleventh Circuit as falling on both sides of this issue.

The Ninth Circuit also straddles this circuit conflict. Its ruling in *Wixom* v. *Washington*, 264 F.3d 894, 897-898 (9th Cir. 2001), seems to adopt the Eighth Circuit's last-in-time approach to section 2244(d)(1)(A):

> [B]ecause the denial of his appeal is a decision terminating review, and Wixom did not appeal this denial to the Washington Supreme Court, we conclude that it marks "the conclusion of direct review." This conclusion does not end our inquiry, however. Section 2244(d)(1)(A) provides that the one-year limitation period "shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Because Wixom could have sought review by the Washington Supreme Court, the limitations period did not start until his time to seek such review expired.

Id. at 897-898. Yet *Hemmerle* v. *Schriro*, 495 F.3d 1069, 1073-1074 (9th Cir. 2007), holds, in a case with facts similar to this one, that section 2244(d)(1)(A) triggers the one-year clock "upon the expiration of the time for seeking review of the Court of Appeals decision in the Arizona Supreme Court," and does not even try to ascertain the date on which "the conclusion of direct review" occurred.

REASONS FOR DENYING THE WRIT

Gonzalez's petition presents this Court with a 1-1 circuit split between the Fifth and Eighth Circuits, while the Ninth and Eleventh Circuits each have taken inconsistent positions on the section 2244(d)(1)(A) issue. Further percolation could aid

this Court's eventual resolution by enabling the Ninth and Eleventh Circuits to resolve their intra-circuit tensions and perhaps produce an opinion with more extensive reasoning. Two additional considerations also counsel against a grant of certiorari in this case. First, the issue that Gonzalez presents will rarely arise because it affects only a small subset of habeas petitioners—those who both terminate their direct appeals before reaching this Court while simultaneously preserving an exhausted claim for federal habeas courts to review. Second, Gonzalez's petition is a poor vehicle for resolving this issue because the COA violates both 28 U.S.C. 2253(c) and *Slack*, casting a shadow over the Fifth Circuit's jurisdiction as well as this Court's ability to reach the merits of this case. It is more prudent for this Court to wait for another petitioner who comes with a clean and unassailable COA.

Finally, if this Court decides to grant certiorari in this case, it should not extend the writ to any of the three questions described in Gonzalez's petition. Neither the Fifth Circuit's opinion in this case, nor the earlier *Roberts* opinion on which it relies, purports to apply or interpret the meaning of "the conclusion of direct review" in section 2244(d)(1)(A), so the first and second questions that Gonzalez proffers are not even presented by this case. The third question that Gonzalez proposes—"[w]hether 'expiration of time for seeking [direct] review' under Section 2244(d)(1)(A) includes the ninety-day period

for filing a petition for writ of certiorari with this Court even when the petitioner forewent discretionary review in the state's highest court"—needs more percolation. No court of appeals has analyzed this question, and the circuit split that Gonzalez contrives rests on nothing more than conclusory remarks and offhand dicta.

I. The Issue Rarely Arises Because Habeas Petitioners Who Fail To Pursue Direct Appeals To The State Supreme Court Will Forfeit Their Claims Under *O'Sullivan* v. *Boerckel*.

The circuit split presented in this case affects only a narrow subset of habeas applicants—those who quit on their direct appeals before reaching the State's highest court *and* who nevertheless preserved an exhausted claim for a federal habeas court to review. Few habeas applicants will fall into this category, because 28 U.S.C. 2254(b) requires state prisoners to exhaust their claims before presenting them to federal habeas courts, and exhaustion can occur only if a prisoner "'fairly present[s]' his claim in each appropriate state court (including a state supreme court with powers of discretionary review)." *Baldwin* v. *Reese*, 541 U.S. 27, 29 (2004). A prisoner who spurns an opportunity to present his claims to the state supreme court cannot pursue those claims in federal collateral proceedings; his failure to exhaust permanently bars him from presenting these claims

in a habeas corpus petition. See *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 848-849 (1999).

Baldwin and *O'Sullivan* make clear that any habeas petitioner who (like Gonzalez) fails to seek discretionary review in the highest state court will run headlong into an exhaustion dismissal, unless his petition asserts claims that he could not have raised on direct appeal (such as ineffective assistance of counsel, or claims based on newly discovered evidence). If a petitioner encounters this exhaustion barrier, the statute-of-limitations issues will not matter. His unexhausted claims will be pitched out under 28 U.S.C. 2254(b) regardless of their timeliness, and courts will not need to resolve the section 2244(d)(1)(A) issue presented by this case. See 28 U.S.C. 2254(b)(3) (providing that an exhaustion defense cannot be waived "unless the State, through counsel, expressly waives the requirement"). The only situations in which Gonzalez's proposed interpretation of 28 U.S.C. 2244(d)(1)(A) could make a difference are in cases where a habeas petitioner: (a) neglects to seek direct review in the state supreme court; (b) manages to avoid a dismissal on exhaustion grounds by presenting a claim that was unavailable during the direct-appeal process; and (c) gambles by filing his habeas petition after the earliest possible date on which the period of limitations might expire. Such cases are rare, which may explain why many circuits have never ruled on the issues presented in

Gonzalez's petition in the 15 years since AEDPA's enactment.

Even if Gonzalez is correct to assert that "a significant percentage of state prisoners on direct review forgo discretionary review in their State's highest court," Pet. at 4, the exhaustion doctrine will squelch every claim that the petitioner could have raised before the State's highest court on direct appeal, without any need for a court to engage the statute of limitations. This factor should weigh heavily in this Court's consideration of Gonzalez's petition, as this Court may wish to preserve its scarce resources for issues affecting more than just a small number of habeas petitioners.

II. The Certificate Of Appealability In This Case Fails To Comply With 28 U.S.C. 2253(c) And *Slack* v. *McDaniel*, Presenting Jurisdictional Hurdles To This Court's Involvement.

Even if this Court were inclined to resolve the circuit split presented by this case, this is the wrong case in which to do it. Gonzalez's appeal from the district court's decision is clouded with jurisdictional problems because the Fifth Circuit issued a defective certificate of appealability. This Court cannot resolve the circuit split in this case unless it first resolves whether the Fifth Circuit should have dismissed Gonzalez's appeal in light of this patently inadequate COA. This is no small task, given that the federal courts of appeals hold divergent views on

whether and when a deficient COA deprives them of appellate jurisdiction.

Federal law prohibits state prisoners from appealing their habeas applications unless they make "a substantial showing of the denial of a *constitutional* right." 28 U.S.C. 2253(c)(2) (emphasis added). Before a federal appellate court can assert jurisdiction over those appeals, the habeas applicant must obtain a COA that identifies "the specific issue or issues [that] satisfy the showing required" by section 2253(c)(2).

After the district court dismissed Gonzalez's claims as time-barred, the Fifth Circuit granted a COA limited to the following question: "whether *Roberts* has been overruled by *Lawrence* and, if so, whether [Gonzalez's] habeas application was timely filed." See 623 F.3d at 224. This COA states only that the district court's *procedural* ruling dismissing Gonzalez's petition on statute-of-limitations grounds is debatable. It nowhere states that Gonzalez has advanced a substantial *constitutional* claim. Nor does it specify the issues that satisfy section 2253(c)(2)'s "substantial showing" requirement, as required by 28 U.S.C. 2253(c)(3). These omissions violate both the federal habeas statute and this Court's holding in *Slack* v. *McDaniel*, which provides:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying

> constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim for the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

529 U.S. 473, 484 (2000) (emphasis added).

The COA issued in this case ignores *Slack* and spurns its requirements. Presenting only a procedural issue for review, the COA fails even to assert that any of Gonzalez's federal constitutional claims qualifies as "substantial" under section 2253(c)(2). Because section 2253(c)(2) and *Slack* withhold appellate jurisdiction over habeas applications absent a substantial federal constitutional claim, this defective COA cannot allow either the Fifth Circuit (or this Court) to resolve the issues presented in Gonzalez's petition for certiorari. At the very least, this Court will be unable to reach the merits of Gonzalez's certiorari petition without first resolving at least three jurisdictional questions.

First is whether a defective COA *requires* a reviewing court to vacate the COA and dismiss the appeal. In *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003), this Court held that the *absence* of a COA deprives courts of appellate jurisdiction to review a district court's denial of habeas relief. See *id.* at 336

("Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite * * * .''). But it is not clear whether this passage from *Miller-El* requires a *properly issued* COA as a precondition to appellate jurisdiction. And the courts of appeals look both ways on this question.

Three courts of appeals have indicated that appellate courts cannot review the merits of a habeas petition when a certificate of appealability fails to comply with section 2253(c). See *United States* v. *Cepero*, 224 F.3d 256, 259-262 (3d Cir. 2000) (holding that a defective certificate of appealability deprives reviewing courts of appellate jurisdiction); *Muniz* v. *Johnson*, 114 F.3d 43, 45 (5th Cir. 1997) (holding that a certificate that "does not comply with § 2253(c)(3) . . . is insufficient to vest jurisdiction in this court"); *Tiedeman* v. *Benson*, 122 F.3d 518, 522 (8th Cir. 1997) (treating a defective certificate "as if no certificate of appealability had been granted by the District Court").

But five circuits have rejected the notion that a certificate of appealability's failure to comply with section 2253(c) deprives the reviewing court of appellate jurisdiction. See, *e.g.*, *Owens* v. *Boyd*, 235 F.3d 356, 358 (7th Cir. 2001) ("[A] defect in a certificate of appealability is not a jurisdictional flaw."); *United States* v. *Talk*, 158 F.3d 1064, 1065 (10th Cir. 1998) ("[A]lthough the absence of a certificate precludes an appeal, an erroneously-

issued certificate does not deprive us of jurisdiction to hear a certified appeal."); *Soto* v. *United States*, 185 F.3d 48, 52 (2d Cir. 1999) ("[A] certificate of appealability issued without meeting the 'substantial showing of the denial of a constitutional right' requirement nonetheless suffices to confer appellate jurisdiction."); *Porterfield* v. *Bell*, 258 F.3d 484, 485 (6th Cir. 2001) ("[A] certificate of appealability, even if improvidently granted, vests jurisdiction in the court of appeals."); *James* v. *Giles*, 221 F.3d 1074, 1076 (9th Cir. 2000) ("Once that certificate [of appealability] is issued, we have jurisdiction even if the certificate was arguably 'improvidently granted.'"). Yet some of these circuits still assert the *power* to dismiss appeals that rest on defective certificates of appealability, even though they do not regard themselves as *required* to do so as a matter of appellate jurisdiction. See, *e.g.*, *Phelps* v. *Alameda*, 366 F.3d 722, 728 (9th Cir. 2004) ("[A]lthough a merits panel generally need not examine the propriety of a COA, it nevertheless retains the power to do so."); *United States* v. *Marcello*, 212 F.3d 1005, 1007-1008 (7th Cir. 2000) (holding that "the best approach is to say we have discretion to decide the case by reviewing the validity of the C[O]A").

Second, this Court will have to resolve whether, and in what circumstances, a State forfeits its objection to a defective COA by failing to raise it promptly before the federal court of appeals. Director Thaler (regrettably) did not object to the

certificate of appealability while this case was pending in the Court of Appeals.[3] If this Court were to require a properly issued COA as a jurisdictional prerequisite to appeals in habeas cases, then this oversight should not matter. But if this Court rejects that view, it will have to address any forfeiture issues presented by the State's belated objections to Gonzalez's COA.

Finally, this Court will have to consider whether it can repair a defective COA by locating and specifying a "substantial showing of the denial of a constitutional right." Section 2253(c)(2) allows a "circuit Justice" to issue a COA; perhaps this allows the circuit Justice for the Fifth Circuit to examine Gonzalez's constitutional claims and unilaterally declare one (or more) of them "substantial." As far as we are aware, no circuit Justice has ever attempted to salvage a deficient COA in this manner, and it is not clear whether this maneuver would allow Gonzalez to continue in this Court or require him to return to the Fifth Circuit to start his appeal anew. Either way, this presents another novel issue to resolve, which this Court can avoid by waiting for a petitioner who obtains a proper COA at the outset.

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[3] Because this issue may affect appellate jurisdiction, the State is obligated to mention it now so that this Court may decide how to proceed.

III. If This Court Decides To Grant Certiorari In This Case, It Should Not Extend The Writ To Any Of The Three Questions Presented In Gonzalez's Petition.

Given that this case presents a disagreement between the Fifth and Eighth Circuits over the meaning of section 2244(d)(1)(A), we recognize that this Court might decide to grant certiorari notwithstanding the concerns discussed in Sections I and II. If this Court decides to grant, we urge this Court to limit the writ of certiorari to the following question:

> When a prisoner declines to seek review in the State's highest court on direct appeal, must section 2244(d)(1)(A)'s limitations period always begin at "the expiration of the time for seeking such review," or must courts also ascertain when "the conclusion of direct review" occurred and start the limitations period on the later of these two dates?

That is the issue on which the Fifth and Eighth Circuits disagree, and it is the only circuit split implicated by the Fifth Circuit's decision in this case.

Describing this case as presenting a "three-tiered conflict" may seem like a useful rhetorical device from the standpoint of Gonzalez's lawyers, who want to leave an impression that no reasonable jurist could possibly vote to deny certiorari in this case. But it falls flat as soon as one reads the Fifth

Circuit's opinion in *Roberts*, as well as the opinion below. Neither ruling purports to apply or interpret the meaning of "the conclusion of direct review" in section 2244(d)(1)(A), so the first two questions presented in Gonzalez's certiorari petition are not implicated by this case. The third question presented in Gonzalez's petition has not been analyzed by any of the appellate decisions that he cites, and further percolation is warranted before this Court weighs in on that question.

We consider each of Gonzalez's proposed questions in turn:

> A. **"Whether state law is relevant to determining when the States' direct review processes conclude, as the Seventh, Eighth, and Eleventh Circuits have held, or whether AEDPA dictates a single federally prescribed point in time when all state direct-review processes are deemed to have concluded, as the Fifth and Ninth Circuits have held."**

The Fifth Circuit's opinion never attempts to determine when the State's "direct-review processes" conclude under section 2244(d)(1)(A), and it does not hold that a "single federally prescribed point in time" governs this inquiry. Rather, it holds only that section 2244(d)(1)(A)'s one-year limitations period *must* begin on the date of "the expiration of the time for seeking [direct] review" if the petitioner

does not appeal to the state court of last resort," and that courts need not interpret or apply section 2244(d)(1)(A)'s "conclusion of direct review" prong in those situations. The Fifth Circuit also determined that the date on which "the expiration of the time for seeking [direct] review" occurred was August 11, 2006—"the last date under the Texas Appellate Rules that he could petition for discretionary review of his judgment." 623 F.3d at 224. The latter of these conclusions is unassailable, and there is no circuit split on whether federal- or state-law standards determine "the expiration of the time for seeking [direct] review"—a court simply applies the deadlines for appeal established in the state's rules of appellate procedure. The only point of contention is whether the Fifth Circuit erred by looking exclusively to the "the expiration of the time for seeking [direct] review" clause in section 2244(d)(1)(A), never bothering to calculate or consider the date on which "the conclusion of direct review" occurred. If this Court decides that the Fifth Circuit was wrong to consider only the date of "the expiration of the time for seeking [direct] review," then it should remand for the Fifth Circuit to determine the date of "the conclusion of direct review," rather than decide the issue for itself.

B. **"Whether, under AEDPA, the 'conclusion of direct review' occurs upon (i) issuance of an intermediate appellate court's mandate, as the Eighth Circuit has held, (ii) expiration of the time for seeking discretionary review in the state's highest court, as the Fifth Circuit held, or (iii) issuance of the intermediate appellate court's decision, as the Ninth Circuit has held."**

Again, the Fifth Circuit's opinion does not reach this issue, and neither does its earlier ruling in *Roberts*. Neither opinion applies the "conclusion of direct review" prong in section 2244(d)(1)(A) because the Fifth Circuit deems this to apply only when prisoners pursue their direct appeals all the way to the Supreme Court of the United States. Gonzalez did not do so; thus his one-year limitations period under section 2244(d)(1)(A) can begin *only* on the date of "the expiration of the time for seeking [direct] review." The Fifth Circuit's decision does not implicate the meaning of "conclusion of direct review" in section 2244(d)(1)(A).

C. **"Whether 'expiration of the time for seeking [direct] review' under Section 2244(d)(1)(A) includes the ninety-day period for filing a petition for a writ of certiorari with this Court even when the petitioner forewent discretionary review in the state's highest court, as the Fourth and Seventh Circuits have held, or excludes that time, as the Fifth, Eighth, Ninth, and Eleventh Circuits have held."**

To say that these circuits have issued "holdings" on this question is a considerable overstatement. The Fifth Circuit has assumed without any discussion that "the time for seeking [direct] review" expires as soon as a prisoner allows the window for pursuing direct appeals to close. See *Gonzalez*, 623 F.3d at 224; *Roberts*, 319 F.3d at 693 & n.14. None of its opinions even considers whether a prisoner who quits the direct-appeals process before reaching the "state court of last resort" could get a 90-day bonus when he is unable to petition for writ of certiorari.

The Fourth Circuit's opinion in *Hill* v. *Braxton*, 277 F.3d 701 (2002), includes the following sentence, which Gonzalez quotes in his certiorari petition: "If no petition for a writ of certiorari is filed in the United States Supreme Court, then the limitation period begins running when the time for doing so—90 days—has elapsed." *Id.* at 704. But this

statement does not hold, or even imply, that someone like Gonzalez should get an extra 90 days before AEDPA's one-year clock starts. Gonzalez aborted his direct appeals before reaching the State's "court of last resort," so he is unable to petition for writ of certiorari, and the 90-day window described in this Court's Rule 13.1 cannot "elapse" when it was never triggered in the first place. See Sup. Ct. R. 13.1 (requiring filing within 90 days of a state court of last resort entering judgment). Gonzalez notes that the petitioner in *Hill*, like Gonzalez, failed to seek review in the state supreme court. But Gonzalez neglects to mention that the opinion in *Hill* never reaches or resolves any issue involving the meaning of section 2244(d)(1)(A). The court in *Hill* held only that district courts could dismiss habeas petitions for untimeliness sua sponte, but that they must give pro se litigants notice before doing so. See 277 F.3d at 705-708. Any stray comment in *Hill* about the meaning of section 2244(d)(1)(A) is dictum, and cannot be invoked to establish a circuit split.

The Seventh Circuit's opinion in *Balsewicz* v. *Kingston*, 425 F.3d 1029 (2005), likewise fails to reach the section 2244(d)(1)(A) issue. The petitioner in *Balsewicz*, like Gonzalez, never sought discretionary review in the state supreme court. And although the Seventh Circuit did assert that the petitioner's conviction "became final on August 22, 1994, allowing for the ninety days in which Balsewicz could have applied for certiorari," the

court went on to note the petitioner's conviction became final prior to AEDPA's enactment on April 24, 1996, so the Court ran the one-year limitations period from AEDPA's enactment date rather than the moment of finality. Section 2244(d)(1)(A) had no bearing whatever on the court's decision in *Balsewicz*, so the Seventh Circuit's statements about section 2244(d)(1)(A) are nothing more than casual asides that do not qualify as holdings, and they do not create a circuit split that warrants this Court's intervention.

* * * * *

Gonzalez is correct to note that the Fifth Circuit's interpretation of section 2244(d)(1)(A) differs from the Eighth Circuit's, but he mischaracterizes this disagreement and needlessly complicates the issues for this Court. The Fifth Circuit holds that courts must look exclusively to the "expiration of the time for seeking such review" prong in cases where the habeas petitioner failed to pursue a direct appeal to the State's highest court, while the Eighth Circuit requires courts also to ascertain "the conclusion of direct review" and start the one-year clock from the later of these two dates. *That* is the circuit split presented by this case, and it is the only potentially certworthy issue for this Court.

CONCLUSION

Because of the vehicle problems presented by the defective COA and the small number of habeas

applicants affected by this issue, the petition for writ of certiorari should be denied. If the Court decides to grant certiorari, it should limit the writ to the following question:

> When a prisoner declines to seek review in the State's highest court on direct appeal, must section 2244(d)(1)(A)'s limitations period always begin at "the expiration of the time for seeking such review," or must courts also ascertain when "the conclusion of direct review" occurred and start the limitations period on the later of these two dates?

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May 2011

REPLY BRIEF

RECORD
AND
BRIEFS

15 2011

No. 10-895

IN THE
Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ,
Petitioner,

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

REPLY BRIEF FOR THE PETITIONER 1

I. RESPONDENT'S ARTICULATION OF A FOURTH WAY IN WHICH THE CIRCUITS ARE SPLIT FURTHER SUPPORTS REVIEW ... 3

A. The Circuit Split is Wide 3

B. The Conflicts Over State Law's Role and the Finality Trigger 4

1. Conflict over the Role of State Law 4

2. Conflicting Finality Triggers Under Federal Law 6

C. The Conflict Over Inclusion of the Certiorari Period 7

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND PROPERLY PRESENTED 9

A. The Questions Presented Are Critical and Recur Frequently 9

B. The Certificate of Appealability Permits this Court's Review 11

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Balsewicz v. Kingston, 425 F.3d 1029 (7th Cir. 2005), cert. denied, 546 U.S. 1144 (2006) 6, 8

Clay v. United States, 537 U.S. 522 (2003) 11

Day v. Crosby, 391 F.3d 1192 (11th Cir. 2004) 13

Day v. McDonough, 547 U.S. 198 (2006) 13

Flores v. Quarterman, 467 F.3d 484 (5th Cir. 2006) 3, 5

Hemmerle v. Schriro, 495 F.3d 1069 (9th Cir. 2007) 3

Hill v. Braxton, 277 F.3d 701 (2002) 8

Holland v. Florida, 130 S. Ct. 2549 (2010) 13

Holland v. Florida, 539 F.3d 1334 (11th Cir. 2008) 13

James v. Giles, 221 F.3d 1074 (9th Cir. 2000) 12

Lawrence v. Florida, 421 F.3d 1221 (11th Cir. 2005) 13

Lawrence v. Florida, 549 U.S. 327 (2007) 6, 13

Lo v. Endicott, 506 F.3d 572 (7th Cir. 2007) 8

Miller-El v. Cockrell, 537 U.S. 322 (2003) 12

Muniz v. Johnson, 114 F.3d 43 (5th Cir. 1997) 12

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 10, 11

Owens v. Boyd, 235 F.3d 356 (7th Cir. 2001) 12

Payne v. Thaler, No. 4:10-CV-307-A, 2010 WL 4739364 (N.D. Tex. Nov. 21, 2010) 11

Pierson v. Dormire, 484 F.3d 486 (8th Cir. 2007) 7

Porterfield v. Bell, 258 F.3d 484 (6th Cir. 2001) 12

Riddle v. Kemna,
523 F.3d 850 (8th Cir. 2008) (en banc)..... 3, 5, 6, 7

Roberts v. Cockrell, 319 F.3d 690 (5th Cir. 2003)... 3, 8

Slack v. McDaniel, 525 U.S. 1138 (1999) (Mem.)..... 13

Slack v. McDaniel, 529 U.S. 473 (2000) 2, 13

Soto v. United States, 185 F.3d 48 (2d Cir. 1999) 12

Tiedeman v. Benson,
122 F.3d 518 (8th Cir. 1997)..... 12

Tinker v. Moore, 255 F.3d 1331 (11th Cir. 2001) 3

United States v. Cepero,
224 F.3d 256 (3d Cir. 2000) 12

United States v. Plascencia,
537 F.3d 385 (5th Cir. 2008)..... 9

United States v. Talk,
158 F.3d 1064 (10th Cir. 1998)..... 12

Wesley v. Snedeker,
159 Fed. App'x. 872 (10th Cir. 2005)..... 9

Wixom v. Washington,
264 F.3d 894 (9th Cir. 2001)..... 3

Statutes

28 U.S.C. § 2244(d)(1)(A)..... *passim*

28 U.S.C. § 2253(c)(1) 12

Other Authorities

Respondent's Brief in Opposition, *Lawrence v. Florida*, 549 U.S. 327 (2007) (No. 05-8820), 2006 WL 816746 13

Nancy J. King *et al.*, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners under the Antiterrorism and Effective Death Penalty Act of 1996*, at 28-30 (2007) *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf 10

REPLY BRIEF FOR THE PETITIONER

In response to the three, recurring, multi-circuit conflicts presented by the petition (Pet. 8-24), respondent admits (BIO 12) that a "circuit split [is] presented by this case." But respondent then tries to dilute the degree of conflict by collapsing the conflicts identified in the first two questions presented into a single, reformulated question for this Court's review.

That respondent proposes yet another question for this Court's review simply underscores the necessity of granting certiorari in this case. Beyond that, respondent's attempted narrowing of the circuit conflict cannot survive a straightforward reading of its own brief or the Fifth Circuit's open and repeated acknowledgments that its law squarely conflicts not just with that of the Eighth Circuit, but also the Eleventh Circuit, while according with Ninth Circuit law.

In any event, respondent's proposed question presented simply papers over the critical predicate questions on which the circuits are squarely conflicted. Indeed, this Court could not answer respondent's proposed question without resolving *both* the conflict over whether state law plays any role in determining when direct review terminates, and, if not, the separate conflict over the uniform federal rule to be applied in the absence of state law.

In other words, subsuming petitioner's first two questions presented into a single umbrella question, as respondent proposes, does nothing to avoid the multi-circuit conflicts presented.

However articulated, the law in this area is deeply fractured. That makes intervention by this Court imperative, both for States, who find that the finality of their criminal convictions and AEDPA's respect for their state processes vary across state lines, and for habeas petitioners, who find that availability of the Great Writ under AEDPA now turns on geographic accident.

Confronted with an acknowledged lack of uniformity in AEDPA's application, respondent contends (BIO 10) that the issue is nevertheless too infrequently recurring to merit review because it will only affect those habeas petitioners who allege "ineffective assistance of counsel, or claims based on newly discovered evidence." (BIO 11). Those, however, are highly common claims, not the rarities that respondent supposes.

Finally, respondent, having waived the issue below, now objects to the terms of the certificate of appealability. The short answer is that the certificate's formulation has no bearing on this Court's certiorari jurisdiction and, in fact, this Court has repeatedly reviewed AEDPA procedural questions in identical circumstances, including in respondent's flagship case, *Slack v. McDaniel*, 529 U.S. 473 (2000).

I. RESPONDENT'S ARTICULATION OF A FOURTH WAY IN WHICH THE CIRCUITS ARE SPLIT FURTHER SUPPORTS REVIEW

A. The Circuit Split is Wide

Respondent's insistence (BIO 18-25) that this case presents a conflict only between the law of the Fifth and Eighth Circuits is at war with the Fifth Circuit itself. That court has openly acknowledged that its law applying 28 U.S.C. § 2244(d)(1)(A) conflicts with the law of both the Eleventh Circuit and the en banc Eighth Circuit. Pet. App. 7a-8a; *Roberts v. Cockrell*, 319 F.3d 690, 694 & n.16 (5th Cir. 2003); *see Riddle v. Kemna*, 523 F.3d 850, 856 (8th Cir. 2008) (en banc); *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001).

The Fifth Circuit has also recognized that Ninth Circuit law comports with its own. *Roberts*, 319 F.3d at 694 & n. 17 (citing *Wixom v. Washington*, 264 F.3d 894, 897-898 (9th Cir. 2001)); *see Flores v. Quarterman*, 467 F.3d 484, 486 & n.4 (5th Cir. 2006) ("[a] split exist[s] among circuits").

Respondent's attempt to contain the conflict to just two circuits also cannot survive a reading of his own brief. *See* BIO 8 (acknowledging that the Ninth Circuit sides with the Fifth Circuit, citing *Wixom* and *Hemmerle v. Schriro*, 495 F.3d 1069, 1073-1074 (9th Cir. 2007)). The circuit conflict is thus as wide as petitioner—and the Fifth Circuit—have said it is.

B. The Conflicts Over State Law's Role and the Finality Trigger

The reason that respondent's reworking of the circuit conflict fails is that its reformulated question presented simply assumes away the conflicts over the role of state law and the different finality triggers under Section 2244(d)(1)(A). Respondent argues (BIO 18) that the *real* question on which the circuit courts are in conflict is whether the "direct review" provision of Section 2244(d)(1)(A) drops out whenever a habeas petitioner fails to seek review in the State's highest court, leaving the "expiration of time" for seeking review as the sole trigger of finality. In respondent's view, Fifth Circuit law renders the "direct review" provision unavailable to such petitioners, because "the conclusion of direct review" can occur only when this Court rejects a certiorari petition or disposes of a case on the merits. *See* BIO 4-8 (failure to appeal to the United States Supreme Court renders the "direct review" prong "inapplicable").

At best, that simply articulates a fourth way in which the circuit courts are in conflict—an argument that underscores the need for this Court's review. But, at bottom, respondent's articulation of the split simply subsumes the first two questions presented in the petition.

1. Conflict over the Role of State Law

Embedded in respondent's question presented is the critical assumption that "the conclusion of direct review" under state law

must occur at a single federally dictated point. The States' varying delineations of when state direct review ends are entirely irrelevant in respondent's view because the "conclusion of direct review" can occur only upon disposition (certiorari or merits) by this Court.

The assumption that Section 2244(d)(1)(A) dictates a single federal-law termination point for direct review, however, is very much disputed by other courts of appeals. Pet. 15-17. Indeed, the Fifth Circuit in this case explained that the central point of departure between the circuits was its refusal—and the Eighth Circuit's willingness—to "rely[] on state court definitions to determine finality under § 2244(d)(1)." Pet. App. 8a; *see Flores*, 467 F.3d at 486 (acknowledging that *Roberts* took sides in the circuit split between Ninth and Eleventh Circuits on the role of federal and state law).

It is precisely because the Eighth and Eleventh Circuits consider state law when applying AEDPA's finality test that the "conclusion of direct review" prong of Section 2244(d)(1)(A) retains vitality as an "alternative trigger" of finality, even when a prisoner does not seek review in the State's highest court. *Riddle*, 523 F.3d at 856. And it is precisely because the Fifth Circuit cuts state law out of the picture that it ends the "direct review" prong's relevance prematurely. In other words, it is the Fifth Circuit's refusal to look beyond its single, federal-law point (Supreme Court review) for terminating direct review that causes it to render the "direct review" prong

irrelevant when defendants halt their direct appeals early.

The relevance of state law in turning off the "direct review" prong thus is exactly where the Fifth, Ninth, Eighth, and Eleventh Circuits part company.[1] Respondent's proposed question simply assumes its preferred answer to that conflict, while the petition properly presents it for this Court's review.

2. *Conflicting Finality Triggers Under Federal Law*

With respect to Gonzalez's second question presented, respondent's argument merely states the problem a different way. Respondent's articulation of Fifth Circuit law dictates one universal finality trigger—the expiration of time for appeal—whenever defendants forgo further state review, and another trigger—disposition of a certiorari petition—when they pursue such review. BIO 5-6.

Right or wrong, that view of the Fifth Circuit's law squarely conflicts with the holding of the en banc Eighth Circuit that the single, federal rule must be the state court's mandate, given this Court's decision in *Lawrence v. Florida*, 549 U.S. 327 (2007). *See Riddle*, 523 F.3d at 856 (alternative holding). The Fifth

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[1] *See also Balsewicz v. Kingston*, 425 F.3d 1029, 1032 (7th Cir. 2005), cert. denied, 546 U.S. 1144 (2006) (applying Wisconsin law, so that conviction became final when "Remittitur issue[d]").

Circuit here looked at *Lawrence* and came to the opposite conclusion, in acknowledged conflict with the Eighth Circuit. Pet. App. 7a. And, as respondent's quotation of the Ninth Circuit notes, that court of appeals picked yet a third marker: the intermediate appellate court's issuance of its decision. BIO 8 (quoting 264 F.3d at 897-898).

The conflict thus is direct, concrete, and fully considered, given the Eighth Circuit's en banc review and the Fifth Circuit's reexamination and reaffirmation of its own conflicting rule in this case. Respondent's rewording of the conflict does not make it go away. Only this Court's review can do that.

C. The Conflict Over Inclusion of the Certiorari Period

With respect to the entrenched, five-circuit conflict over whether "expiration of the time for seeking [direct] review" under Section 2244(d)(1)(A) includes the 90 days for seeking certiorari review in this Court, respondent disputes (BIO 22) whether the other courts' decisions are "'holdings.'" The courts of appeals say otherwise.

Sitting en banc in *Riddle*, all eleven members of the Eighth Circuit unanimously acknowledged the existence of a circuit conflict in the law on this question. 523 F.3d at 855; *see Pierson v. Dormire*, 484 F.3d 486, 494 (8th Cir. 2007) ("Circuits are split on whether a state prisoner who fails to appeal to a discretionary state court of last resort is entitled to the ninety-day period," noting that

the Seventh Circuit "has held" differently from what the Fifth and Tenth Circuits "have held"). That is not a "casual aside[]." (BIO 24).

Respondent dismisses (BIO 23-24) the Seventh Circuit decision in *Balsewicz v. Kingston*, 425 F.3d 1029 (2005), because the conviction "became final" before AEDPA's enactment. But the way the Seventh Circuit determined when the conviction "became final" was by applying Section 2244(d)(1)(A)'s definition and including the 90-day certiorari period, notwithstanding the habeas petitioner's failure to seek review in the State's highest court. *Id.* at 1031-1032. Moreover, the Seventh Circuit has subsequently followed that holding. *See Lo v. Endicott*, 506 F.3d 572, 574 (7th Cir. 2007).

Likewise, the Fourth Circuit in *Hill v. Braxton*, 277 F.3d 701 (2002), could not have spoken more clearly: "If no petition for a writ of certiorari is filed in the United States Supreme Court, then the limitation period begins running when the time for doing so—90 days—has elapsed." *Id.* at 704. That the court ultimately remanded for the district court to apply equitable tolling does not change the fact that the certiorari period would be counted in the timeliness calculation.

Likewise, the Fifth Circuit in *Roberts* specifically held that, "by failing to file a petition for discretionary review," Roberts sacrificed the inclusion of the 90-day period in his limitations calculation. 319 F.3d at 693 & n.14. And the Fifth Circuit has treated that

holding as conclusive. *See United States v. Plascencia*, 537 F.3d 385, 388 & n.10 (5th Cir. 2008) (extending *Roberts* to federal prisoners who did not file a notice of appeal).

Moreover, respondent completely ignores conflicting cases that the petition cited from the Eighth Circuit and Tenth Circuit, further documenting the persisting circuit split. *See* Pet. at 23-24 (citing *Riddle*, *supra* and *Wesley v. Snedeker*, 159 Fed. App'x. 872, 873-74 (10th Cir. 2005)).

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND PROPERLY PRESENTED

A. The Questions Presented Are Critical and Recur Frequently

Content to leave AEDPA law in a state of disarray, respondent contends that the multiple conflicts are not of sufficient significance to warrant this Court's review. That blinks reality.

First, the circuit conflicts span six different circuits, and the sheer volume of appellate decisions implicating these same finality issues document the importance of the questions presented. That is why the Eighth Circuit addressed each issue en banc, and the Fifth Circuit felt compelled to revisit and reaffirm its law in this case.

The issues, moreover, are important not just to habeas petitioners in those six circuits, but to respondent's eighteen sister States in the Fourth, Seventh, Eighth, and Eleventh Circuits

who labor under interpretations of AEDPA that postpone the finality of their convictions longer than for States in the Fifth and Ninth Circuits. AEDPA was enacted to promote uniform rules of finality and to respect federalism principles. The current regime of contradictory rules defeats both ends.

Second, the central predicate of respondent's argument is flawed. Respondent contends (BIO 11) that the problem rarely arises because, when a prisoner's counsel forgoes direct review in the State's highest court, exhaustion principles limit AEDPA's applicability to "ineffective assistance of counsel" and "newly discovered evidence" claims. That, however, is a large volume of cases because claims of ineffective assistance and newly discovered evidence have never been in short supply in habeas petitions.[2]

Third, respondent's exhaustion argument is just wrong. In *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), this Court held that, to exhaust a prisoner's state remedies properly, the prisoner need only give the State's highest court "one

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[2] *See* Nancy J. King *et al.*, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners under the Antiterrorism and Effective Death Penalty Act of 1996*, at 28-30 (2007) *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (81% of capital and 50.4% of non-capital petitions include ineffective assistance claims; 25.5% of capital and 18.9% of non-capital petitions include new evidence claims).

full opportunity" to consider the substance of a prisoner's claims before they can be raised in federal habeas, *id.* at 844-45. A prisoner can satisfy that requirement *either* by pursuing direct review *or* state collateral review to the state's highest court. The latter, in fact, is what Gonzalez did when he filed his petition under Section 11.07 of the Texas Code of Criminal Procedure. *See, e.g.*, *Payne v. Thaler*, No. 4:10-CV-307-A, 2010 WL 4739364, at *1 (N.D. Tex. Nov. 21, 2010).[3]

B. The Certificate of Appealability Permits this Court's Review

Respondent also contends (BIO 12) that the certificate of appealability issued by the Fifth Circuit counsels against review. That is wrong.

First, the argument has been waived because, as respondent acknowledges (BIO 16-17), it was not raised below.

Second, the law is well settled that any alleged defect in a certificate of appealability has no effect on this Court's certiorari jurisdiction. Indeed, the plain text of AEDPA imposes the certificate requirement only on "an appeal * * * to the court of appeals," not

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[3] In any event, this Court has granted review to address even "narrow but recurring" questions of AEDPA's application, *Clay v. United States*, 537 U.S. 522, 524 (2003), because of the importance of protecting habeas corpus and the States' interest in the finality of their convictions.

certiorari review by this Court. 28 U.S.C. § 2253(c)(1).

Nor did the alleged error affect the court of appeals' jurisdiction. While the complete absence of a certificate of appealability deprives appellate courts of jurisdiction, *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the same rule does not apply when a certificate identifies a question for review, but contains other defects. *See Owens v. Boyd*, 235 F.3d 356, 358 (7th Cir. 2001); *United States v. Talk*, 158 F.3d 1064, 1065 (10th Cir. 1998); *Soto v. United States*, 185 F.3d 48, 52 (2d Cir. 1999); *Porterfield v. Bell*, 258 F.3d 484, 485 (6th Cir. 2001); *James v. Giles*, 221 F.3d 1074, 1076 (9th Cir. 2000).[4]

Proving the point, this Court has repeatedly granted certiorari to resolve procedural questions dividing the lower courts under AEDPA when, as here, the courts of appeals had granted certificates of appealability limited

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[4] Respondent invokes (BIO 15) *United States v. Cepero*, 224 F.3d 256 (3d Cir. 2000), but that case addressed whether courts of appeals could review a district court's issuance of a certificate, *id.* at 259-262. It did not hold that any alleged defect in the certificate stripped the court of jurisdiction. It was only when the court concluded that no certificate should have issued at all that the decision took on jurisdictional consequence under *Miller-El*. *Id.* at 267. *Tiedeman v. Benson* 122 F.3d 518, 522 (8th Cir. 1997), and *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997), are similarly of no help to respondent because they involved certificates that failed to identify *any* issue at all for review, and thus were the functional equivalent of no certificate.

to procedural grounds. Even worse for respondent, in *Slack v. McDaniel*, 529 U.S. 473 (2000) itself, this Court granted review of a question concerning successor habeas petitions, 525 U.S. 1138 (1999) (Mem.), even though *no* certificate of appealability had been issued at all, 529 U.S. at 480. *Compare also Holland v. Florida*, 130 S. Ct. 2549 (2010) (granting review and deciding procedural question of equitable tolling under AEDPA), *with Holland v. Florida*, 539 F.3d 1334, 1338 (11th Cir. 2008) (certificate of appealability confined to procedural question); *compare Lawrence v. Florida*, 549 U.S. 327 (2007) (deciding statutory tolling question under AEDPA), *with Lawrence v. Florida*, 421 F.3d 1221, 1224 (11th Cir. 2005) (describing the purely procedural certificate of appealability issued); *compare Day v. McDonough*, 547 U.S. 198 (2006) (deciding timing question under AEDPA), *with Day v. Crosby*, 391 F.3d 1192, 1193 (11th Cir. 2004) (certificate of appealability confined to procedural question issued).

Importantly, those grants of review did not overlook the narrowness of the certificate of appealability. In *Lawrence*, the State made the same argument that respondent makes here in its brief in opposition, *see* Respondent's Brief in Opposition, *Lawrence v. Florida*, 549 U.S. 327 (2007) (No. 05-8820), 2006 WL 816746 at *5. It was no barrier to this Court's review and power to address circuit conflicts there, and neither is it here. Indeed, to hold otherwise would empower circuit courts to insulate their precedential rulings from this Court's review by

granting plausibly defective certificates of appealability.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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JOINT APPENDIX

Supreme Court, U.S.
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No. 10-895

In The
Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ,
Petitioner,

v.

RICK THALER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

Page

Appendix A: Relevant Docket Entries of the United States District Court for the Northern District of Texas, No. 3:08-CV-0151-D 1

Appendix B: Relevant Docket Entries of the United States Court of Appeals for the Fifth Circuit, No. 08-10871 8

Appendix C: Petitioner's First Amended Motion to Dismiss before the 265th Judicial District Court, Dallas County, Texas 14

Appendix D: Relevant Excerpts from Hearing on Motion for Speedy Trial before the 265th Judicial District Court, Dallas County, Texas (Testimony of Luz Del Cid and Harold Renfroe) 29

Appendix E: Relevant Excerpt from Trial before the 265th Judicial District Court, Dallas County, Texas (Excerpt from State's Closing Argument) 67

Appendix F: Petition for Writ of Habeas Corpus to the Texas Court of Criminal Appeals 69

Appendix G: Petitioner's Brief in Support of Writ of Habeas Corpus 87

Appendix H: State's Response to Petition for Writ of Habeas Corpus 99

Attachment H-1: Opinion of the Fifth District Court of Appeals at Dallas 106

Appendix I: Findings of Fact and Conclusions of Law by the 265th Judicial District Court, Dallas County, Texas Regarding Petition for Writ of Habeas Corpus 124

Appendix J: Order of the 265th Judicial District Court, Dallas County, Texas Transmitting Findings of Fact and Conclusions of Law 132

Appendix K: Order of the Texas Court of Criminal Appeals Denying Petition for Writ of Habeas Corpus 133

Appendix L: Federal Petition for Writ of Habeas Corpus 134

Attachment L-1 - Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus 147

Appendix M: Petitioner's Notice of Appeal and Petition for Certificate of Appealability from the United States District Court for the Northern District of Texas 155

Appendix N: Recommendation of United States Magistrate Judge for the Northern District of Texas Denying Certificate of Appealability 159

Appendix O: Order of the United States District Court for the Northern District of Texas Denying Petitioner's Certificate of Appealability 162

Appendix P: Petitioner's Petition for Certificate of Appealability to the United States Court of Appeals for the Fifth Circuit 165

Appendix Q: Relevant Excerpts from Petitioner's Brief In Support of Petition for Certificate of Appealability to the United States Court of Appeals for the Fifth Circuit 167

Attachment Q-1 - Mandate of the Fifth District Court of Appeals at Dallas Regarding Petitioner's Direct Appeal 188

Attachment Q-2 - Opinion of the Fifth District Court of Appeals at Dallas 190

Attachment Q-3 - Brief for Appellant to the Fifth District Court of Appeals at Dallas 208

Attachment Q-4 - Transcript Excerpts from Petitioner's Trial and Speedy Trial Hearing Before the 265th Judicial District Court, Dallas County, Texas 235

Attachment Q-5 - Letter from R. Hendrichs to R. Gonzalez dated July 13, 2006 325

Attachment Q-6 - Petitioner's Objections to Findings, Conclusions and Recommendations of the U.S. Magistrate Judge for the United States District Court for the Northern District of Texas Regarding Petitioner's Federal Petition for Writ of Habeas Corpus 327

Attachment Q-7 - Petitioner's Reply to Respondent's Answer in the United States District Court for the Northern District of Texas Regarding Petitioner's Federal Petition for Writ of Habeas Corpus 337

Appendix R: Order of the United States Court of Appeals for the Fifth Circuit Granting Petitioner's Certificate of Appealability 346*

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* The extensive typographical errors in many of the Joint Appendix documents are accurate transcriptions of the original documents, which contain such errors.

APPENDIX A

U.S. District Court
Northern District of Texas (Dallas)
CIVIL DOCKET FOR CASE #: 3:08-cv-00151-D

Gonzalez v Quarterman	Date Filed: 01/31/2008
Assigned to: Chief Judge Sidney A Fitzwater	Date Terminated: 08/20/2008
Case in other court: 08-10871	Jury Demand: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)	Nature of Suit: 530 Habeas Corpus (General) Jurisdiction: Federal Question

Petitioner

Rafael Arriaza Gonzalez

Represented by:
Rafael Arriaza Gonzalez
TDCJ No. 1316090
TDCJ Lynaugh Unit
1098 S. Highway 2037
Fort Stockton, TX 79735
PRO SE

V.

Respondent

Nathaniel Quarterman
Director TDCJ-CID

Represented by:
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Office of the Texas
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/31/2008	1	PETITION for Writ of Habeas Corpus filed by Rafael Gonzalez (Filing fee $5.00; receipt number 18842) (twd) (Entered: 02/01/2008)
01/31/2008	2	MOTION for Copies of Trial Clerk Record With Reporter's Record and Exhibits/Discovery by Rafael Arriaza Gonzalez. (twd) (Entered: 02/01/2008)
02/05/2008	5	ORDER PERMITTING PROCEEDING IN A CASE PURSUANT TO 28 U.S.C. § 2254 AND REQUIRING RESPONDENT TO SHOW CAUSE (See Order for specifics.) (Signed by Magistrate Judge Wm F Sanderson, Jr on

		02/05/2008) (twd) (Entered: 02/05/2008)
02/05/2008	6	ORDER: IT IS ORDERED that Petitioner's motion requesting a copy or access to the state court record is DENIED. (Doc. #2). (Signed by Magistrate Judge Wm F Sanderson, Jr on 02/05/2008) (twd) (Entered: 02/05/2008)
04/11/2008		Received State Court Papers: 2 folder(s) (mfw) (Entered: 04/11/2008)
04/11/2008	11	*Respondent's* ANSWER to Complaint by Nathaniel Quarterman With Brief in Support. (Attachments: #1 Exhibit A) (Meador, Jon) Modified on 4/11/2008 (tln). (Entered: 04/11/2008)
05/19/2008	14	Reply filed by Rafael Arriaza Gonzales to 11 Respondent's ANSWER. (twd) (Entered: 05/21/2008)
07/18/2008	15	FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE on case: It is recommended that the habeas corpus petition be DISMISSED with prejudice as barred by the one-year statute of limitations. Magistrate Judge Wm F Sanderson, Jr no longer assigned to case. (Signed by

		Magistrate Judge Wm F Sanderson, Jr on 7/18/2008) (twd) (Entered: 07/18/2008)
07/31/2008	16	OBJECTION to 15 FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE filed by Rafael Arriaza Gonzalez. (twd) (Entered: 07/31/2008)
08/20/2008	17	ORDER ADOPTING 15 FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE (Signed by Judge Sidney A Fitzwater on 8/20/2008 (twd) (Entered: 08/20/2008)
08/20/2008	18	JUDGMENT: It is ordered that this petition is denied and dismissed with prejudice as barred by limitations. (Signed by Judge Sidney A Fitzwater on 8/20/2008) (twd) (Entered: 08/20/2008)
09/04/2008	19	NOTICE OF APPEAL to the Fifth Circuit as to 17 Order Adopting Findings and Recommendations, 18 Judgment by Rafael Arriaza Gonzalez. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to

		parties not electronically noticed. (twd) (Entered: 09/04/2008)
09/04/2008		MOTION for Certificate of Appealability filed by Rafael Arriaza Gonzalez (See 19 for document.) (twd) (Entered: 09/04/2008)
09/12/2008		USCA5 Case Number 08-10871 for 19 Notice of Appeal filed by Rafael Arriaza Gonzalez. (klm) (Entered: 09/12/2008)
10/02/2008	23	MOTION for Extension of Time to File Notice of Appeal in Forma Pauperis filed by Rafael Arriaza Gonzalez (Forwarded from USCA5.) (twd) (Entered: 10/16/2008)
10/10/2008	21	RECOMMENDATION REGARDING CERTIFICATE OF APPEALABILITY: The party appealing should be GRANTED leave to proceed in forma pauperis. A Certificate of Appealability should be DENIED. (See Order for specifics.) (Ordered by Magistrate Judge Wm F Sanderson, Jr on 10/10/2008) (twd) (Entered: 10/14/2008)
10/14/2008	22	ORDER OF THE COURT ON THE FOREGOING 21 RECOMMENDATION: The party appealing is GRANTED in forma pauperis on appeal. A

		Certificate of Appealability is DENIED. (See Order for specifics.) (Ordered by Judge Sidney A Fitzwater on 10/14/2008) (twd) (Entered: 10/15/2008)
10/22/2008	25	ORDER denying 23 Motion for Extension of Time to File Notice of Appeal.; denying 24 Motion for Court Transcripts W/O Costs. (Ordered by Judge Sidney A Fitzwater on 10/22/2008) (twd) (Entered: 10/22/2008)
11/06/2008	26	NOTICE OF APPEAL to the Fifth Circuit as to 22 Order Adopting Findings and Recommendations by Rafael Arriaza Gonzalez. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. (twd) (Entered: 11/07/2008) [* * * *]
12/02/2008	32	Record on Appeal Transmitted to Warden, Lynaugh Unit re 19 Notice of Appeal, 26 Notice of Appeal, - USCA5 Number: 08-10871. 1 vol. electronic record, 2 SCR folders. (jmr) (Entered: 12/02/2008)

02/12/2009		NOTICE of Return of the Appellate Record to Clerk's Office; re: 19 Notice of Appeal, 26 Notice of Appeal, by Rafael Arriaza Gonzalez. (jmr) (Entered: 02/12/2009)
03/06/2009	34	Record on Appeal Transmitted to USCA5 re 19 Notice of Appeal, 26 Notice of Appeal, - USCA5 Number 08-10871. (jmr) (Entered: 03/06/2009)
03/19/2009	35	Received letter from USCA5: 34 Record on Appeal received on 03/10/2009. (twd) (Entered: 03/19/2009)
11/01/2010	36	Opinion of USCA (certified copy) in accordance with USCA judgment re 19 Notice of Appeal, filed by Rafael Arriaza Gonzalez, 26 Notice of Appeal, filed by Rafael Arriaza Gonzalez. Judgment is affirmed. (svc) (Entered: 11/03/2010)
11/01/2010	37	JUDGMENT/MANDATE of USCA as to 19 Notice of Appeal, filed by Rafael Arriaza Gonzalez, 26 Notice of Appeal, filed by Rafael Arriaza Gonzalez. Issued as Mandate: 10/28/10. Judgment of the district court is affirmed. (svc) (Entered: 11/03/2010)

APPENDIX B

General Docket
United States Court of Appeals for the 5th Circuit

Court of Appeals Docket #: 08-10871
Docketed: 09/08/2008
Nature of Suit: 3530 Habeas Corpus (Prisoner Petition)
Rafael Gonzalez v. Rick Thaler, Director
Termed: 10/06/2010
Appeal From: Northern District of Texas, Dallas
Fee Status: In Forma Pauperis

Case Type Information:
1) Prisoner w/ out Counsel
2) State
3) Habeas Corpus

Originating Court Information:
District: 0539-3 : 3:08-CV-151
Ordering Judge: Sidney A. Fitzwater, U.S. District Judge
Date Filed: 01/31/2008
Date NOA Filed: 09/04/2008
Date Rec'd COA: 09/05/2008

Prior Cases:
None

Current Cases:
None

Panel Assignment: Not available

RAFAEL ARRIAZA GONZALEZ (#1316090)
Petitioner – Appellant

Rafael Arriaza Gonzalez
[NTC Pro Se]
CID Lynaugh Prison
1098 S. Highway 2037
Fort Stockton, TX 79735

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
Terminated: 09/02/2009
Respondent – Appellee

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
Respondent – Appellee

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RAFAEL ARRIAZA GONZALEZ
Petitioner - Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent – Appellee

09/08/2008	Prisoner case docketed without counsel. NOA filed by Appellant Rafael Arriaza Gonzalez. [08-10871 (RFP) [
10/31/2008	District Court order – COA denied. Date Denied: 10/14/08 [08-10871] Awaiting DC Action ddl satisfied. Motion for COA due on 12/10/08 for Rafael Arriaza Gonzalez. Brief in Support of COA due on 12/10/08 for Rafael Arriaza Gonzalez. (MCS)
11/19/2008	Notice of appeal filed in DC 11/6/08 by

	Appellant Rafael Arriaza Gonzalez treated as motion for certificate of appealability. [6161675-1] Motion due ddl satisfied. [08-10871] (TMR)
01/29/2009	Brief filed in support of motion for Certificate of Appealability [6161657-1] by Appellant Rafael Arriaza Gonzalez Brief in Support ddl satisfied. Excess pgs [Y/N]?: n Motion Requested [Y/N]? n [6208559-1] [08-10871] (SDH)
03/10/2009	RECORD ON APPEAL FILED. Record Part: Electronic Pleadings, No. of Volumes: 1; Record Part: Exhibits, Comments: 1 Box (SCP) [08-10871] (SDH)
12/10/2009	COURT ORDER granting motion for certificate of appealability filed by Appellant Mr. Rafael Arriaza Gonzalez [6161657-2] Judge(s) EMG. [08-10871] (GRM)
01/15/2010	APPELLANT'S BRIEF FILED by Mr. Rafael Arriaza Gonzalez. . # of Copies Provided: 4 A/Pet's Brief deadline satisfied. Appellee's Brief due on 02/17/2010 for Appellee Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division [08-10871] (SDH)
02/18/2010	APPELLEE'S Memorandum BRIEF FILED by Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. .# of Copies Provided: 7 E/Res's Brief deadline satisfied. Reply brief due on

	03/04/2010 for Appellant Rafael Arriaza Gonzalez [08-10871] (SDH)
03/11/2010	BRIEFING COMPLETE. Reply Brief deadline cancelled [08-10871] (MBC)
03/22/2010	MOTION filed by Appellant Mr. Rafael Arriaza Gonzalez to appoint counsel [6497636-2]. Date of service: 03/16/2010 [08-10871] (SDH)
07/08/2010	COURT ORDER denying motion to appoint counsel filed by Appellant Mr. Rafael Arriaza Gonzalez [6497636-2] Judge(s): EGJ [08-10871] (SDH)
07/16/2010	CLERK'S OFFICE RECORD EXCERPTS FILED for Appellant Mr. Rafael Arriaza Gonzalez. # of Copies Provided: 4 [08-10871] (SDH)
10/04/2010	NO ORAL ARGUMENT heard. [08-10871] (PFT)
10/06/2010	PUBLISHED OPINION FILED. [08-10871 Affirmed] Judge: PEH , Judge: EBC , Judge: PRO. Mandate pull date is 10/27/2010 [08-10871] (ARC)
10/06/2010	JUDGMENT ENTERED AND FILED. [08-10871] (ARC)
10/28/2010	MANDATE ISSUED. Mandate pull date satisfied. [08-10871] (SDH)
1/13/2011	SUPREME COURT NOTICE that petition for writ of certiorari [6715911-2] was filed by Appellant Mr. Rafael Arriaza Gonzalez on 01/04/2011. Supreme Court Number: 10-895 [08-10871] (CAV)
06/13/2011	SUPREME COURT ORDER received

	granting petition for writ of certiorari filed by Appellant Mr. Rafael Arriaza Gonzalez in 08-10871 on 06/13/2011. [6833880-1] [08-10871] (LGL)

APPENDIX C

NO. F95-31860 & F01-01091

STATE OF TEXAS	§	IN 265TH JUDICIAL
V.	§	DISTRICT COURT OF
RAFAEL GONZALEZ	§	DALLAS COUNTY, TEXAS

DEFENDANT'S FIRST AMENDED MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, undersigned counsel and files this First Amended Motion to Dismiss the above styled and numbered cause. In support of said motion, undersigned counsel would show unto the Court as follows:

I.

The indictment alleges conduct that occurred 12 June 1995. The case was filed with the alleged defendant "at large" indicted and assigned cause number F95-31860. It was represented to the Grand Jury on 23 May 2001 to correct a fatal error in the Indictment. Deadly weapon was not properly alleged and the words "fire arm" were added. The State was aware of the allegations as of the date of the incident.

Due to the fact that a witness knew the alleged defendant from their hometown in Guatemala, the state was also aware of the likelihood the alleged defendant would return to Guatemala as well as his specific location.

II.

Two phone calls and one fax in over six years are not sufficient. Nor is that fact that there is no record of who was contacted. Despite having reliable and credible information of the likelihood of the defendant returning to Guatemala, at no time did the Irving Police Department, through Detective Renfro, exercise due diligence. He did not attempt to contact Guatemalan authorities nor did he follow up with the United States authorities. Through the witness to the alleged incident, Luz del Cid, Detective Renfro had at his disposal information as to where the defendant's family lived and where he would likely return. Nor did the State of Texas, through the Dallas County Criminal District Attorney's Office ever take steps to inform the proper agencies of this information despite having such information in the report supplied by the Irving Police Department. Over nine years and nine months elapsed between the alleged conduct and the defendant's arrest. The Dallas County Sheriff's Office was just as grossly negligent. This is illustrated by their attempts to apprehend the defendant at the same address listed in 1995 four months after receiving information he was in custody in Guatemala. No agency of the state made attempts to communicate with each other, provide pertinent information, nor follow up. Their actions and inactions show the unimportance of all

the parties involved.

II.

The United States Federal Government, through Special Agent Alexis Vasquez of the Federal Bureau of Investigation, notified the Dallas County District Attorney's Office of the defendant's arrest in Guatemala. Investigator Jeff Shaw was notified on the 30th day of March 2001. The Defendant, Rafael Gonzalez, was not served with his indictment until 3 August 2004.

III.

Over nine years and nine months have passed since the indictment occurred on 18 July 1995. Over three years and five months elapsed from the time the State was placed on notice of the Defendant's apprehension in Guatemala.

IV.

The four factors of the test for speedy trial under the Sixth Amendment to the United States Constitution are: 1) the length of the delay, 2) the reason for the delay, 3) the Defendant's assertion of his speedy trial right, and 4) prejudice to the Defendant from the delay. *Barker v. Wingo*, 407 U.S. 514, 531, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). The test applied for determining whether there is a speedy trial violation is the same under the Sixth Amendment to the United States Constitution and Art. I, Section 10 of the Texas Constitution. *Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App.), *cert. denied*, 506 U.S. 942, 113 S. Ct. 381, 121 L. Ed. 2d

292 (1992); *Hull v. State*, 699, S.W.2d 220, 221 (Tex. Crim. App. 1995).

A. Length of Delay

Most delays of eight months or longer are considered presumptively unreasonable and prejudicial. *Pierce v. State*, 921 S.W.2d 291 (Tex. App.—Corpus Christi 1996); *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 2691 n. 1, 120 L. Ed. 2d 520 (1992); *Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App.). The length of the delay in this case is nine years and nine months.

B. Reason for Delay

It is the State's burden to establish an excuse for the delay. *Pierce v. State*, 921 S.W.2d 291 (Tex. App.—Corpus Christi 1996) *State v. Empak, Inc.*, 889 S.W.2d 618, 621 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). *State v. Hernandez*, 830 S.W.2d 631, 634 (Tex. App.—San Antonio 1992, no pet.). The State's negligence, however innocent, militates against the State. *Pierce v. State*, 921 S.W.2d 291 (Tex.App.—Corpus Christi 1996) *Empak*, 889 S.W.2d at 624; *Branscum v. State*, 750 S.W.2d 892, 895 (Tex. App.—Amarillo 1988, no pet.). The defense would assert that there is no reasonable excuse in law for the delay.

1. No Good Faith Action Taken at or Near Time of Incident

The government has a duty to find a defendant accused of a crime. Whenever an individual has been officially accused of a crime, not only is the

government charged with the burden of bringing the accused swiftly to trial, but it is under an obligation to exercise due diligence in attempting to locate and apprehend the accused, even if he is a fugitive who is fleeing prosecution. *United States v. Diacolios*, 837 F.2d 79, 82 (2d Cir. 1988); *United States v. DeLeon*, 710 F.2d 1218, 1221 (7th Cir. 1983), *United States v. Bagga*, 782 F.2d 1541, 1543 (11th Cir. 1986) (citing, *Smith v. Hooey*, 393 U.S. 374, 383 (1969) which establishes that the government has an affirmative obligation to locate and apprehend a known suspect). "Once an accused has been indicted, the government has a constitutional duty to make a diligent, good faith effort to locate, apprehend and bring him to trial." U.S. v. Packard, 857 F. Supp. 726, 729 (C.D. Calif. 1994). *Citing*, U.S. v. Shell 961 F.2d 138, 144 (9th Cir. 1992), *overruled on other grounds* 974 F.2d 1035 (9th Cir. 1992). The prosecutors own question which stated that the authorities have *no time to follow up* couldn't better show the state's fundamental misunderstanding and contradiction of the law on Speedy Trial. It is imperative and required by the U.S. and Texas Constitutions, as well as case law, that the government **make time** to follow up. They cannot attempt to piggy back the actions of civilians as they are attempting to do in this case. Although, the actions of the civilians are a far better example of diligence in apprehending this defendant.

The state has a duty to exercise due diligence in the apprehension of suspects abroad. The United States Supreme Court decision in *Doggett* is directly on point. The Court places a duty in law enforcement to extend their search for a suspect beyond the

geographical borders of the United States. The Court states that: "For six years, the Government's investigators made no serious effort to test their progressively more questionable assumption that Doggett was living abroad, and, **had they done so, they could have found him within minutes**. While the Government's lethargy may have reflected no more than Doggett's relative unimportance in the world of drug trafficking, it was still findable negligence..." *Doggett v. United States*, 505 U.S. at 652-3. (emphasis added). Here, the lead investigator, Renfro, had knowledge not only that the defendant was from Guatemala, but also what department, what municipality and what village. Renfro know "where all persons involved are from." (quoting his own notes). In Renfro's affidavit dated 16 April 2001 he admits that "[d]uring my investigation I learned that the suspect had fled the country and was reportedly back in Guatemala staying with his family in Mordasang, Guatemala." (emphasis added). His notes admitted at trial dated June 13, 1995, that he did not bother to consult nor even review, lists the location of the suspect. There is no need to speculate to the government's knowledge of the defendant's specific whereabouts. At this time the government could have asked for his apprehension and began the extradition process. *The Treaty for the mutual extradition of fugitives from justice*, 33 Stat 2147 & 55 Stat 1097, does not require that a suspect be incarcerated. (Nor does Interpol) It applies to those who "...shall seek an asylum or be ***found*** within the territories of the other." (emphasis added) *Id* at p.2.

At a minimum a reasonable person would have consulted or contacted the FBI, Department of State,

Texas Attorney Generals Office, the U.S. Embassy in Guatemala or any number of agencies. He admitted knowledge of Interpol and its purpose during the hearing. He chose not ask Interpol to issue a "Red Notice" for apprehension of the defendant. He merely presumed that there was no way to diligently locate a defendant in a foreign country for trial. He presumed wrong. This presumption was the cause of the inaction and was grossly negligent.

He could have distributed a memorandum to the Guatemalan government's office of Interpol, attempted to contact the FBI in Guatemala, or ask for a notice to be entered in the State Department's (or at a minimum the Guatemalan Embassy's) system that would alert officials should the defendant ever present or ask for any paperwork from the U.S. Government. *U.S. v. Perez-Cestero*, 737 F. Supp. 752, 752-762 (S.D.N.Y. 1990). *U.S. v. Blanco* 861 F.2d 773, 778 (2d Cir. 1988) *cert denied* 489 U.S. 1019 (1989). "Unless there is a showing that an effort to have the defendant returned to this country for trial would be futile, the government must make such an effort. There has been no such showing here." *U.S. v. McConahy* 505 F.2d 770, 773 (11 Cir. 1974). The defendant did in fact present himself and the State failed to apprehend the Defendant.

As Luz Del Cid testified, "it would be easy" to find someone in her village in Guatemala. The Department, Nuevo Progresso, where their village is located is sparsely populated. Detective Renfro had specific information that he chose not to use. He could have had the defendant arrested within minutes. He had very specific information that Marajuma Morazan Departamento El Progreso

Gustatoya Guatemala C.A. was the hometown of Mr. Rafael Gonzalez. Detective Renfro was presented with information that the defendant was spotted in that specific part of Guatemala. Through evidence presented during the hearing it was shown that the Department of El Progreso has a total of a little over one hundred thousand inhabitants. The department is broken up into eight municipalities.

This is even further evidenced by the fact that no local, state nor federal agency attempted to have the defendant extradited, as soon as his whereabouts were known, under 18 U.S.C.A. § 3148 entitled *Fugitives from foreign county to United States*. It lays out the procedure issuing a warrant of arrest in a foreign country with which there is a treaty of extradition. It allows for a complaint to be filed and after it is deemed to meet the requirements under the treaty it may be sent to the Secretary of State, "...that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." 18 U.S.C.A. § 3184. This is evidence that a fugitive need not be first apprehended by a foreign government to begin the extradition process. The government demonstrates ignorance of this law and should be held negligent.

2. Due to the States Negligence the Defendant was Not Apprehended in the U.S. Embassy in Guatemala.

Mr. Gonzalez presented himself to the U.S.

Embassy in Guatemala on February 7, 2001. Mr. Gonzalez presented a passport with his true name and date of birth. Authorities missed an opportunity to apprehend Mr. Gonzalez due to the negligence of the state. Mr. Gonzalez could have been arrested or detained and not subject to extradition. For an Embassy of the United States would be considered "...within the special jurisdiction of the United States." *United States v. Morton* 314 F. Supp.2d 509, 513 (D.C.MD.) citing *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) cert. denied 414 U.S. 876 (1973). According to *Erdos* a consulate is part of the territory of the United States. *Erdos* at 159. citing, *United States v. Archer*, 51 F. Supp.708, 709 (S.D. Cal.1943). It stands to reason that an embassy would be territory of the United States. Therefore the Treaty of Extradition would not apply.

The *Treaty for the Mutual Extradition of Fugitives from Justice*, 33 Stat.2147 & 55 Stat. 1097, states that "The Government of the United States and the Government of Guatemala mutually agree to deliver up persons ... **found with in the territory of the other.**" Id at p. 2 (emphasis added). Because Mr. Gonzalez was not in the territory of Guatemala the treaty is inapplicable. *United States v. Trujillo* 871 F.Supp.215, 221 (D.C.Del. 1994).

Any delay created beyond this point is due to the bad faith negligence of the state and should not be held against Mr. Gonzalez. He was in the presence of U.S. authorities yet they had no information regarding his warrant status in the United States. It would <u>not</u> have taken a heroic effort to apprise the Embassy in Guatemala of Mr. Gonzalez's status as a fugitive from justice and to follow up at periodic

intervals. In fact it would stand to reason that if his location was known, the Embassy in Guatemala should have been contacted often. Any opportunity to delay extradition, if such action was taken, was a direct result of negligence by the government.

3. Government Negligent in Not Attempting any Action to Speed Up Extradition

After the defendant was in custody of the Guatemalan authorities the government could have taken action to attempt to speed up extradition. The state could have taken advantage of comity between the State of Texas and the Federal Government to relay speedy trial issues and the need for Mr. Gonzalez's swift return. At some point a direct request at the highest levels might have yielded results. *United States v. Packer*, 857 F. Supp.726, 731 (C.D.Cal. 1994). Intervention by the elected official at the Dallas County District Attorney's Office with the Federal Government or the Embassy in Guatemala may have yielded results. Speedy trial issues should have been mentioned in the extradition paperwork to relay those concerns to the federal agency working on behalf of the county as well as the Guatemalan counterparts. Any issues that a Central American government may have had with the death penalty should have been addressed as well. (It is common knowledge of other countries opposition to the death penalty.) At a minimum periodic reports could have been required. *Id.*

All the state did was respond to inquiries from federal authorities. There is no evidence that they initiated any activity to hasten Mr. Gonzalez's return. The state need not undertake heroic efforts, however,

there is not evidence that they took any action. Their actions may have been successful and the burden is on the government to show that a good-faith effort would have been futile. *Id.* at 729. citing *United States v. McConahy*, 505 F.2d 770, 773 (7th Cir.1974). To show futility the state must show more than the Federal or Guatemalan Agencies decision would have been discretionary and that they may have chosen not to help. *Packard* at 729. citing, *Smith v. Hooey*, 393 U.S. 374, 382 (1969). "The possibility of a refusal is not the equivalent of asking and receiving a rebuff." *Id.*

The government was negligent in its supervision of the extradition process in Guatemala. There were only three emails during the extradition procedure by the Federal Government. One dated September 4, 2002, another August 25, 2003 and finally one June 23, 2004. The one dated September 4, 2002, one year and five months after Mr. Gonzalez was in the custody of Guatemalan authorities mentions that "Maybe all these extraditions need is just a push." An obvious opinion that more could be done than merely waiting around for the Guatemalans. The United States Government finally took action in April 2004 urging the Guatemalans to provide a status report. A higher level intervention seemed to have finally taken place three years and one month after Mr. Gonzalez was taken into custody. Three months later the extradition was finalized. Additionally, according to the governments own timeline there is no action taken from October 9, 2001 to March 25, 2003. The government's lethargy was a reflection of Mr. Gonzalez's relative unimportance in the world of crime. It is findable negligence. *Doggett* at 653. The

delay and lack of diligence in pursuing a quick resolution to the extradition process is negligent and shows a lack of due diligence on behalf of the government. "Where the American right to demand extradition is established by treaty, considerations of foreign policy might well be subordinated to speedy trial." *U.S. v. Salzman*, 548 F.2d 395, 402 (2nd Cir. 1976).

C. Defendant's Assertion Of His Speedy Trial Right

Defendant was not aware of this indictment until March of 2001. Any claim that he did not assert his right and is therefore prevented from raising a motion to dismiss is specious. Mr. Gonzalez's action of entering the Embassy in Guatemala demonstrates that he did not have knowledge of his indictment. He was living conspicuously in Guatemala having a passport in his own name. It is the burden of the government to rebut or prove that the defendant knew of his pending indictment. *Doggett* at 653. Additionally, the affidavit of Detective Renfro along with the extradition papers was not handed over to the defense until two weeks before trial set for March 7, 2005. The documents from the Federal Government were not revealed until March 15, 2005. The defendant has asserted his right to speedy trial in due course.

D. Prejudice To The Defendant From The Delay

"Prejudice . . . should be assessed in the light of the [following] interests . . . which the speedy trial right was designed to protect[:] (I) to prevent

oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."*Pierce v. State*, 921 S.W.2d 291 (Tex.App.—Corpus Christi 1996) *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972).

Mr. Gonzalez is asked to now present a defense to an incident that happened nearly ten years ago. He is unable to properly assist in the preparation of his defense. "Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Barker* at 532. Impairment of one's defense is the most difficult form of speedy trial prejudice to prove because of time's erosion on exculpatory evidence that testimony can rarely be shown. *Doggett* at 655. Citing, *Barker* at 532.

The delay caused by the government in this case has created a presumption of prejudice sufficient to excuse the defendant from needing to make an actual showing of actual prejudice. *Packard* at 733 (referring to the situation in Doggett). In the *Shell* case the Ninth Circuit held that the "...Government had not "persuasively rebutted" the presumption even though the defendant had "conceded that most of the essential witnesses and documentary evidence [are] still available." *Id. citing* Shell, 974 F.2d at 1036.

Further, he was held in Guatemala for three years and five months. Since the date of his incarceration in Guatemala over four years have passed. Mr. Gonzalez has suffered an oppressive pretrial incarceration as well as suffered a great deal of anxiety and concern as a result of the bad faith

negligence of the state.

V.

Therefore, Defendant's right to a speedy trial, as guaranteed by the Sixth Amendment to the United States Constitution , and Article 1, Section 10 of the Texas Constitution , has been denied, and Defendant is entitled to a dismissal of the indictment filed in this case.

June 1995 to June 2001 is an amount of time sufficient to trigger a speedy trial hearing. So is the three years and five months that Mr. Gonzalez spent in Guatemala awaiting extradition. The government is solely to blame for the extraordinary time that has passed from the time of Mr. Gonzalez's indictment to his arrest and extradition to Texas. They are wholly negligent in their pursuit of a known defendant despite having his exact location. Mr. Gonzalez asserted his right to a speedy trial in due course. Finally, the negligent delay between his indictment and arrest presumptively prejudiced Mr. Gonzalez's ability to prepare for an adequate defense. The government is merely seeking to avoid the consequences of its negligent conduct in seeking the defendant.

VI.

WHEREFORE, the Defendant prays the court grant this motion and dismiss the indictment on file in this cause for the state's failure to furnish the Defendant a speedy trial.

Respectfully submitted,
BURLESON, PATE & GIBSON, L.L.P.

/s/ Dan Montalvo
DAN MONTALVO, Of Consel
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COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion was delivered to Assistant District Attorney, Dallas County, Texas on this the 22 day of April 2005.

/s/ Dan Montalvo
DAN MONTALVO

APPENDIX D

REPORTER'S RECORD

(VOLUME TWO OF VOLUMES)

CAUSE NO. F01-01091-R

THE STATE OF TEXAS	(265TH JUDICIAL DISTRICT COURT
VS.	(OF DALLAS COUNTY, TEXAS
RAFAEL ARRIAZA GONZALES	(JANUARY TERM, A.D. 2005

****

HEARING ON MOTION FOR SPEEDY TRIAL

****

On the 25th day of March, 2005, the following proceedings came on to be heard in the above-titled and numbered cause before the HONORABLE COURT, KEITH DEAN, JUDGE Presiding, held in Dallas, Dallas County, Texas.

(Proceedings reported by CAT MACHINE SHORTHAND Method.)

(****** PRESENT AS INTERPRETER.)

LUZ DEL CID,

having been first duly sworn, testified through the duly sworn interpreter as follows:

DIRECT EXAMINATION

BY MS.

Q Ms. Delcid, will you state your name and spell your name for the record?

A Luz Delcid. (Spelling) L-U-Z.

Q Okay.

A (Spelling) D-E-L-C-I-D.

Q And ma'am, do you know or did you know a Roberto Velasquez?

A He was my brother.

Q On June 12th, 1995, what happened to your brother?

A He was killed.

Q How was he killed?

A He was shot three times.

Q Were you present when this happened?

A Yes.

Q Where were you in relation to your brother at the time?

MR. MONTALVO: Your Honor, I'm going to object. It's going outside the scope of this hearing. I thought she was only going to testify to due diligence involved in the case.

MS. WILBANKS: She is - may I respond?

THE COURT: What do you expect to bring out at this point?

MS. WILBANKS: That she was right there and she got a good look at the defendant in order to

give the detective a starting point for looking for him.

THE COURT: I'll allow that part.

Q (By Ms. Wilbanks) Ma'am, how close were you to your brother - I mean distance-wise - at the time that he was shot?

A I don't remember, but six or fifteen feet.

Q Okay. Did you see the person that shot your brother?

A Yes.

Q Do you know him?

A Yes.

Q Who was it?

A The one that is seated right there, Rafael.

Q What's Rafael's last name?

A Gonzales.

Q When you say the one that is sitting right there, what is that person wearing?

A The white jumper.

MS. WILBANKS: Your Honor, let the record reflect that the witness has identified the defendant in open court.

Q After Rafael Gonzales shot and killed your brother, what happened to Rafael?

A He left.

Q How did he leave?

A In a car.

Q Later on that day did you speak to a Detective Renfroe with the Irving Police Department?

A Yes.

Q Did you tell Detective Renfroe that you had been present at the time that your brother was shot?

A Yes.

Q And a few days later did Detective Renfroe show you a photo lineup that included the defendant in this case, Rafael Gonzales?

A Yes.

Q And you were able to pick him out in a photo lineup?

MR. MONTALVO: We would stipulate she's an eyewitness to it.

THE COURT: Let go ahead and move on to the other part.

MS. WILBANKS: Okay.

Q (By Ms. Wilbanks) After you had conversations with Detective Renfroe, did you have some close contact with your mom who lived in Guatemala at the time?

A It was later.

Q Where did your mom live in Guatemala?

A She lived in Marajuma Morazan El Progreso Guastatoya, Guatemala.

Q Okay. Had you and the defendant and some of your other brothers and sisters grown up in that same village?

A Yes.

Q So your mom was familiar with the defendant?

A Yes.

Q Did your mom have some contact with the defendant in Guatemala in August or September of 1995?

A Yes.

Q So he was - she actually saw him in Guatemala during that time?

A Yes, he threatened her.

Q What did you do after that happened?

A I told my mother not to worry about it.

Q Did you come up to the District Attorney's Office and get some information about the case?

A Yes.

Q What did you do with that information?

A I sent it back to Guatemala.

Q How did you send it to Guatemala?

A By FAX.

Q Who did you send it to?

A To my mother.

Q Did she receive it?

A Yes.

Q What did she do with it?

A She took it to the Supreme Court.

Q And what did they tell her?

A That not to worry about it.

Q And she took it there in August or September of 1995?

A Yes.

MS. WILBANKS: State passes the witness.

CROSS EXAMINATION

BY MR. MONTALVO:

Q Ma'am, the information that you had in 1995, who else did you pass it on to?

A Nobody else.

Q Okay. At the time of the murder, June 12th, 1995, you provided that information to Detective Renfroe, correct?

A Yes.

Q The information that you just said here in court, the town - go ahead.

A El Progreso.

Q Well, that would be a department, correct?

A Yes.

Q Okay. And in fact Guatemala's made of twenty-two departments, correct?

A Twenty-two, yes.

Q And Morazan is one of eight municipalities in the department of El Progreso, right?

A Yes. Yes.

Q And Marajuma would be a village within that municipality, correct?

A It's like a small town.

Q Okay. How many people in that small town?

A Not that many. I don't know how many.

Q A few hundred?

A I don't know. It's been seventeen years since I been here.

Q Okay. Well, when you were growing up to the time you left, it was a very small - you used the word village?

A Yes.

Q Okay. So it's maybe a few hundred to a couple of thousand?

A Like two thousand.

Q And the State of El Progreso is not very big either, correct?

A No.

MR. MONTALVO: May I approach, Your Honor?

THE COURT: Yes, sir.

Q I'm showing you what's been marked as

Defense Exhibit A. Now this is a map of Guatemala, correct? You recognize this?

A Yes.

Q And you recognize it dividing Guatemala into the twenty-two departments, correct?

A Yes.

Q And then I guess Page 2 of this deals just with El Progreso?

A Yes.

Q And it shows the eight municipalities that are in that department, correct?

A Yes.

Q And then Page 3 of it, there's a circle in the center of that map. And I think you can read that, it says Morazan; is that correct?

A Yes.

Q And that would be the basic location of where your village would be, correct?

A Yes.

Q And it's not far from the City of Guatemala, correct?

A Two hours and a half.

MR. MONTALVO: At this time we'd offer Defendant's Exhibit A, and offer to the State for any objections.

MS. WILBANKS: No objection, Your Honor.

THE COURT: It's admitted.

MR. MONTALVO: Permission to publish?

THE COURT: Yes, sir.

Q (By Mr. Montalvo) And that department - I don't remember if I asked you this or not - it's not densely populated, correct?

A No.

Q So if you need to locate somebody, there's not many people and it's fairly easy to find, correct?

A No.

THE COURT: I don't understand the answer. It is easy to find someone or it is not easy to find someone?

A It is easy.

THE COURT: Okay.

Q (By Mr. Montalvo) And again, this is the information that you provided Detective Renfroe the same day of the alleged murder, correct?

A Yes.

Q And Guatemala is a poor country but it has telephones and FAXes, correct?

A Yes, all of that.

Q And when you were speaking with Detective Renfroe, he understood what you were saying and you understood what he was saying, correct?

A We understood each other, but we had an interpreter.

Q So you had someone there that spoke Spanish and English, correct?

A Yes.

Q And that was just to make sure that everything was clear, correct?

A Yes.

Q And when you came to the D.A.'s Office - you said that was in 1995, correct?

A Yes.

Q Do you remember with whom you spoke?

A With Renfroe.

Q Did you go to the D.A.'s Office or did you go to the Irving Police Department?

A I went to the police and was transferred over there with Renfroe, and then he went to my house.

Q And that's where you provided the information that Rafael Gonzales was spotted in Guatemala, correct?

A Yes.

Q So not only did you tell him at the time the incident happened, but you also told him in July or August of 1995, correct?

A Yes.

Q And people in Guatemala use the United States Embassy quite a bit; is that correct?

A Yes.

Q And when you went to the Supreme Court in Guatemala, they didn't tell you that they had already had that information, correct?

A I didn't go over there, my mother went.

Q Okay. But you don't know of any information being related, do you?

A She answered before you asked.

THE COURT: Go ahead and say her answer.

A I didn't go over there, I sent the papers to her.

Q Okay. But your mother went?

A Yes.

Q And you don't have any information, whether it be through her or by whatever means, that they were already aware of his being a fugitive or his presence in Guatemala?

A No.

MR. MONTALVO: Pass the witness.

REDIRECT EXAMINATION

BY MS. WILBANKS:

Q Ma'am, at the time that your mom saw the defendant in Guatemala, did she know whether or not the defendant was living there or not?

A He was not living in Guatemala, he was on the run.

Q So she didn't know of an exact address for the defendant there; is that right?

A No.

Q After you witnessed the defendant's shooting your brother, did you ever see him, the defendant, in the area again?

A No.

Q Did you ever see him in Texas again?

A No, only I knew that he was here.

Q After he was extradited back, not between the time that you knew he was in jail here. Are you saying that you knew he was here when we brought him back and put him in jail?

A (NO VERBAL RESPONSE.)

Q You said that you only knew that he was here. When was it that you knew he was here?

A He was hanging around several different places. I knew that he was at a hotel in Jupiter.

Q But you just heard that from some mutual friends, you never actually saw him there?

A Yes.

Q And you reported all that to Detective Renfroe?

A Yes.

Q But you never saw the defendant again?

A No.

Q Until today?

A Until today.

Q Did your mom have some word that the defendant left Guatemala after she had seen him in 1995?

THE INTERPRETER: Counsel, would you repeat that.

Q Did your mom know that or hear that the defendant had left Guatemala after she saw him in 1995?

A Yes.

Q Where did she say he had gone?

A Through some commentaries, that he was in Honduras or El Salvador.

Q Ms. Delcid, you said earlier that you had heard though some friends that the defendant was here in the States. When was that?

A Before he fled to Guatemala.

Q So sometime between June 12th, 1995, the day that your brother was killed, and August-September 1995 when your mom spotted him down there?

A Yes.

MS. WILBANKS: State passes the witness.

RECROSS EXAMINATION

BY MR. MONTALVO:

Q No one was sure of his whereabouts, correct?

A No.

Q And again you told Detective Renfroe - you informed him of the possibility that he would go back to Guatemala, correct?

A Yes.

MR. MONTALVO: Pass the witness.

MS. WILBANKS: No further questions, Your Honor.

THE COURT: Any objections to this witness being released?

MS. WILBANKS: No, Your Honor.

MR. MONTALVO: None from the defense, Your Honor.

(WITNESS EXCUSED BY AGREEMENT OF COUNSEL.)

* * * *

REPORTER'S RECORD

VOLUME 3 OF _____ VOLUMES

TRIAL COURT CAUSE NO. F01-01091-R

THE STATE OF TEXAS	(	IN THE DISTRICT COURT
VS.	(	OF DALLAS COUNTY, TEXAS
RAFAEL GONZALES	(	265TH JUDICIAL DISTRICT

****

HEARING ON SPEEDY TRIAL MOTION

****

On the 31st day of March, 2005, the following proceedings came on to be heard in the above-entitled and numbered cause before the HONORABLE KEITH DEAN, Judge of said Court, held in Dallas, Dallas County, Texas:

Proceedings reported by computerized machine shorthand.

HAROLD RENFROE, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. WILBANKS:

Q Good morning, Detective Renfroe. Can you please state your name and spell your name for the record?

A Harold Renfroe, and it's r-e-n-f-r-o-e.

Q Detective Renfroe, how are you employed?

A I'm a police officer for the City of Irving.

Q How long have you been so employed?

A Twenty-four years.

Q Are you a detective in the homicide and robbery division of the Irving Police Department?

A Yes.

Q And on June 12th, 1995 were you assigned a case to investigate the death of Roberto Velasquez?

A Yes.

Q On that date did go out to the scene of the crime?

A Yes, I did.

Q And talk with a Luz Delcid who turned out to be the victim's sister?

A Yes.

Q Did she give you some information as to who committed the crime?

A Yes, she did.

Q Who did she say committed the crime?

A Rafael Gonzales.

Q Based on that information, what's the first thing you did in the case?

A We tried to determine his full name and date of

birth and exactly who he was.

Q Were you able to do that?

A Yes.

Q How long did that take you?

A A couple of days.

Q Why did it take you that long?

A Because we had no date of birth and the Rafael Gonzales name was so common.

Q Once you took the time to figure out or once you figured out his name, what did you do next?

A We checked addresses. We obtained a warrant for his arrest and checked some addresses for him that he supposedly lived at in Garland.

Q Where did you get those addresses?

A They were on some cards that were in Roberto's pocket.

Q So you had information that the victim in this case, Roberto Valesquez, and the defendant, Rafael Gonzales, had lived at the same place?

A Yes.

Q Specifically what is that address?

A It was 110 North Jupiter, number 115, in Garland, and 110 North Jupiter, number 226, in Garland.

Q Did you go to those addresses?

A Yes.

Q And I presume you went to look for the defendant.

A Yes.

Q Did you find him?

A No, they had formerly lived there and the manager didn't know anything about him any more.

Q So you talked to the manager of the apartment complex.

A Yes.

Q What else did you do to try to find the defendant?

A I talked to Luz Delcid and she told us different places that we might go look for Mr. Gonzales, never really that specific an address other than an area to look for him.

Q Did you go to those places?

A Yes.

Q How many of those did you go to?

A There was three.

Q Tell the judge what those were.

A We went to 225 Melba in Dallas. We didn't see any sign of Mr. Gonzales or the car he was driving. She also told us he was hanging out on Melba Street, but she didn't know a specific address. We checked that street, didn't see any of the vehicles.

Q When you say any of the vehicles, you mean the vehicles involved in the murder.

A Yes, the white Honda.

Q Okay. Were there any more than the one that the defendant was supposedly driving?

A No.

Q There was a red car involved.

A Oh, there was a red car, yes.

Q Did you have the name of those individuals?

A One of them was Albino Chavarria, and I can't remember the other guy's name. I would have to look at my report.

Q That's okay. So you had the name of another

person who might have been involved in the murder.

A Yes.

Q Did you look for those addresses of those people?

A Yes, that Melba address was Albino Chavarria's dad's, I believe.

Q So you went to that address in order to try to find the defendant.

A Yes.

Q What other address did you go to?

A That's the only addresses we went to.

Q Okay. Where else did you go to try to find the defendant?

A We talked to Luz Delcid and she told us that she had heard that they had gone to California.

Q Okay. Did she give you a specific city in California?

A Los Angeles, California.

Q No specific address?

A No.

Q When you say they went to California, who was she referring to?

A Rafael Gonzales, his wife, and I believe Albino Chavarria.

Q At that time did you have a warrant out for the defendant's arrest?

A Yes.

Q When did -- you had a warrant for the defendant's arrest. Was there anything on NCIC or TCIC?

A No, we filed the case on 6-28 to get the warrant on the computer.

Q And that's sixteen days after it happened?

A Yes.

Q And what was the purpose of filing the case on 6-28?

A Because the addresses were bouncing around so far and they were leading us out of state, so we put the -- we filed the case so the warrant would go in the computer and TCIC and NCIC.

Q In relation to the time that Luz Delcid told you that she thought the defendant had fled to California, what date did you file the case and put it on NCIC, TCIC?

A 6-28 of '95.

Q The same day?

A Yes.

Q So the very date you were told that he might be in California, you decided to put out an NCIC on him so that if anyone stopped him on the roads in between here and there and they ran his criminal history, they would find him.

A Yes.

Q During your search for the defendant, did you find that he had other identities?

A Yes.

Q Did you follow up on the addresses for those IDs?

A No, I didn't.

Q Did you call any other apartment complexes that the defendant might have lived at other than this one on Jupiter?

A No.

Q After you filed the case on July, I'm sorry, on

June 28th, 1995, what did you do next to try to find the defendant?

A We put it on the -- it was put on the computer by the Dallas County Sheriff's Office. And I talked to Luz Delcid again around August, and she told me that she had -- that Rafael Gonzales had been seen in Guatemala.

Q What did you do at that point?

A I contacted the American Embassy in Guatemala City, Guatemala.

THE COURT: Excuse me, I didn't get the date.

THE WITNESS: It was on 8-3.

THE COURT: Of?

THE WITNESS: '95.

THE COURT: Okay.

A I talked to a Lance Ruth (ph).

Q So you talked to a gentleman named Lance Ruth?

A Yes.

Q What did you convey to him?

A He was with the American Embassy. I talked to him about the warrant that we had and that they had been seen in Guatemala.

Q Did you have any other specific information?

A No.

Q Did you have an address of where the defendant might be?

A No.

Q A city?

A I later found a city, but not at that time.

Q So you were able to tell him this defendant is known to be in Guatemala but nothing more specific

than that.

A That's true.

Q And that's because you didn't have anything.

A That's correct.

Q What's your next contact or attempt to try to find the defendant?

A It was 3-6 of 1996.

Q And how did that come about?

A I talked to a representative from Express Bonding in Dallas. They had the bond on Albino Chavarria.

Q At that time he was still listed as a suspect in the case.

A Yes.

Q What was that conversation?

A I had expressed to him that I was looking to talk to Albino. And he told me that Albino's uncle had come in to pay his bond and that he wanted the receipts mailed to Guatemala.

Q Did he give you any more information other than Guatemala?

A He just said that it was a small village down there and they didn't really have mailboxes. That if you sent the mail to that one village, it would be dispersed to the people in Morazan, Guatemala I think is the name.

Q What did you do with that information?

A I contacted the American Embassy in Guatemala and the State Department in Dallas.

Q What kind of information did you give them?

A Just what the bonding company told me.

Q Did you give them the name of the village?

A Yes.

Q So on two separate occasions, on August 3rd, 1995 and on March 6th, 1996, you contacted the U.S. Embassy in Guatemala; is that right?

A Yes.

Q And on March 6th, 1996 you contacted the State Department in Dallas.

A Yes.

Q After that, between 1996, March 6th, 1996 and March 30th, 2001, did you do anything to try to find the defendant?

A No.

Q Why not?

A He was -- The case had been filed with the DA's office and what was on the computer and he was out of the country, as far as we knew.

Q You don't have any arrest authority or any authority to go to Guatemala to try to find this guy.

A No, we don't.

Q Did you have any other leads, any other sources of information about the defendant's whereabouts?

A No, we didn't.

Q So nobody contacted you about where the defendant might be.

A No, ma'am.

MS. WILBANKS: State passes the witness.

CROSS-EXAMINATION

BY MR. MONTALVO:

Q Detective Renfroe, do you understand that I guess you, the police detective, DSO, the State, are under the obligation to apprehend a defendant as

soon as possible and bring him to trial?

A Yes.

Q And were you operating under that presumption after March of 1996?

A I followed up any leads that I could find on him, yes.

THE COURT: I'm sorry, I couldn't hear.

THE WITNESS: I followed up on all leads that I could find on him, wherever he was at.

Q Well, after that date, did you glance at the file once a month, did you make any calls?

A No.

Q Now, when you -- you said on two occasions you called the embassy in Guatemala, correct?

A Yes.

Q How did you make that contact?

A By phone and by fax.

Q And when you handed over your file in its entirety to the DA, those notes would have been in there?

A I believe so, in a supplement.

Q Did you bring your file here today with you?

A Yes.

Q Are they in there?

A The supplement?

Q The information where you contacted the embassy in Guatemala or State Department.

A I turned it over to the DA.

Q When did you do that?

THE COURT: Do you have an objection?

MS. WILBANKS: No. But I would like the record to reflect that I've copied the entire file that

Detective Renfroe tendered to me and the defense attorney has had a copy of it for at least three weeks.

Q Well, where is it? Is that your file there with you?

A Yes, I gave her the copy of my fax.

Q Okay. Well, the fax, where is it?

A She should have it in the file there.

MR. MONTALVO: Could I see that?

MS. WILBANKS: I'll go get it. You've got a copy of it, though.

Q This cover sheet is all that was in your file?

A Pardon me?

Q The cover sheet is all that's in your file?

A Yeah, that's the cover sheet for the fax that I sent. I sent the arrest report. I'm just giving you the warrant and the affidavit and a copy of the report on this fax.

Q Okay. And so this would be the entirety in your file as to --

A Yes.

Q -- the fax sent.

You testified as well that on October -- and I'm sorry, is that the same cover sheet you used for both times or did you use another cover sheet?

A On the second time I just talked to them by phone.

Q Okay. So you have one fax and one phone call.

A Yes.

Q You said that you spoke with them on August 3rd.

A Yes.

Q 1995, is that correct?

A Yes, sir.

Q And you said at that time you didn't know the name of the village that they were in, correct?

A No.

Q In your notes, here's one that's got a date on it, 6-13-1995.

A Yes.

Q All of these people are from Marajuma, Morazan.

A I believe that's the people that were living in the apartments at the time.

Q So when you have where all persons involved are from, and you have Marajuma -- this is a copy of something out of his pocket; is that correct?

A Yes, that's out of his wallet.

Q Okay. Is that your handwriting where all persons involved are from?

A Yes.

Q Okay. So this exhibit, Defendant's Exhibit I, says where all persons are from and it lists Marajuma, Morazan Departamento El Progreso, Guastatoya, Guatemala, C.A., correct?

A Yes.

Q And on Defendant's Exhibit H dated 6-13-1995, it says all these people are from Marajuma, Morazan.

A Yes.

Q Okay. So I guess if you put both of them together, you can imply that you were talking about the defendant, the victim, the witnesses, that's who all the persons involved would be, correct?

A Possibly, yes.

Q Well, they are your notes. I mean --

A Yes, I mean, that's true, yes.

MR. MONTALVO: We would offer Defendant's Exhibits H and I into evidence.

MS. WILBANKS: No objection.

THE COURT: It's admitted.

MR. MONTALVO: Permission to publish?

THE COURT: Yes, sir.

Q And with whom did you speak at the U.S. Embassy?

A That was Lance Ruth (ph).

Q Is that that in your notes as well?

A I believe so.

Q Or did you have to look that up?

A I believe it's in there.

Q And you believe or did you look over your file?

A Yeah, somewhat, yes.

Q And that would be the first time and the second time?

A Yes.

Q Now, what, if any, action did they take as a result of that --

A I have no --

Q -- or do you know?

A I don't know.

Q You never followed up with them?

A No.

Q Did you ever consider Interpol?

A No.

Q And why is that? You're familiar with Interpol, correct?

A Sure.

Q And what do you understand them -- what do you understand them to do?

A To track out of country suspects, I believe.

Q And you don't know if they have to be under arrest or not, do you?

A No.

Q And at that time, I mean you were aware of Interpol, correct?

A Yes.

Q And it's just something that you chose not to do?

A I just didn't do it.

Q And you never contacted any other federal authorities other than the State Department or the Guatemalan Embassy, correct?

A That's true.

Q Did you ever speak with anybody else as to how you would apprehend a defendant in a foreign country?

A No.

Q Did you ever contact anyone I guess regarding any procedures you would have to take?

A No.

Q You just had that one fax and one phone call.

A Yes, sir.

Q And then after that, in '96, it went unmonitored, correct?

A Yes.

Q Did you just presume that they had taken action?

A I thought they would, yes.

Q And had I guess the embassy taken action, I guess he would have been arrested if he showed up at the embassy; is that what you were hoping for?

A I suspected that eventually he would be arrested down there.

Q So you suspected that the embassy would take it upon themselves to go and find and arrest this individual, correct, the defendant in this case?

A Yes.

Q And you made an affidavit for the extradition papers; is that correct?

A I didn't, no.

Q I'll show you what's been marked as State's Exhibit G. Maybe you just don't remember. Did you ever get a call from a prosecutor asking you for paperwork --

A Yes.

Q -- regarding extradition?

A Yes.

Q Okay. And you recognize your signature there?

A Oh, yes, it is. I did that.

Q Okay. Does that refresh your memory?

A Yes.

Q It's dated 16 April, 2001, correct?

A Yes.

Q And it says here, I learned -- during my investigation, I learned that the suspect had fled the country and was reportedly back in Guatemala staying with his family in, you've got it written M-o-r-d-a-s-a-n-g.

A Yes.

Q Guatemala. Is that -- were you just going from

memory as to what the name of the Marajuma?

A That's the way the bonding company had given me that.

Q So you didn't double check the information from the bonding company with your notes?

A That's what he had in his records, and that's what he had been given.

Q No, I understand that. But you didn't double check it with your notes.

A No.

MR. MONTALVO: We would offer Defendant's Exhibit G into evidence.

MS. WILBANKS: No objection.

THE COURT: It's admitted.

MR. MONTALVO: Permission to publish?

Q Didn't at some point Luz Delcid approach you and tell you that her mom spotted him in Guatemala?

A Yes.

Q And you gave her information to fax to Guatemala?

A No, I didn't.

Q You did not?

A No.

Q Getting back to you relaying information to the State Department, you never followed up on that, correct?

A That's true.

Q And the embassy in Guatemala, correct?

A That's right.

Q And, again, had they taken action on it, you presumed he would have been arrested down there if he had ever presented himself, correct?

A Yes.

Q Now I'm showing you what's been marked as Defendant's Exhibit J. I guess it says Republic of Guatemala.

A Yes.

Q Passport.

Q And on there it says Rafael Gonzales Arriaza.

A Yes.

Q That's how you knew him to be named, correct?

A Yes.

Q It shows an issue date of 27 October 2000; is that correct?

A Uh-huh.

Q Or '00.

A Yes.

Q And on one of the pages, it has application received, 7 February of 2001, American Embassy in Guatemala, correct?

A Yes.

MR. MONTALVO: At this time we would offer Defendant's Exhibit J into evidence, tender to defense counsel for any objection -- I mean to the prosecutor for any objections.

MS. WILBANKS: Judge, we are going to object to Defendant's Exhibit J. It hasn't properly been authenticated and at this point there is no sponsoring witness to say that this is what it purports to be. The markings on this could have been made by anybody. We just don't know that at this point.

We don't have the original document. This is just a fax, a copy. This could -- I mean for all we know,

it could be two separate -- it appears to be the front and back of something, but we don't know if it's the front and back of the same one or different ones or what. It's just --

So we would object on those grounds.

THE COURT: All right. I'll overrule the objection. I will review it, but just with all evidence, some will have more substantiation than others.

Q (By Mr. Montalvo) In filling out an application for a visa, that can be a lengthy application, correct?

A I have no idea.

Q Okay. At least you have to provide name and date of birth, correct?

A Yes.

Q And I guess had the State Department taken action on that, he could have been arrested there at the embassy, correct?

A I have no idea.

Q Defendant's Exhibit K says U.S. Department, nonimmigrant, visa application. It doesn't look short, does it?

A It doesn't appear to be.

Q It's three pages in total, correct?

A Yes.

Q Asks for a significant amount of information, correct?

A Yes.

Q So had the State Department used your information, they would have had him on the system, correct?

A I would think so.

MR. MONTALVO: We would offer K into

evidence.

Q I guess the fact that if someone had presented themselves to the U.S. Embassy in Guatemala, that would be fairly easy to double check, correct?

A I would think so, yeah.

Q Be a matter of making a phone call down there. You called down there, correct?

A Yes.

Q Did you ever attempt to contact any of the Guatemalan authorities?

A No.

Q The state police, the local police?

A No, sir.

Q The Guatemalan department in charge of Interpol?

A No.

Q And when you contacted the State Department, I guess was that with the hope they would put him on some sort of system where if he presented himself at the border or at an embassy, he would be arrested?

A Yes.

Q Or at least someone would be notified he's there.

A Yes.

Q So how long would you say that you looked for the defendant?

A A couple of weeks, something like that.

Q And you knew what village he lived in, correct?

A I had obtained that information at one time, yes.

Q And you knew he had been spotted in that

village, correct?

A Yes.

Q And you determined that information to be -- you determined that information to be reliable, correct?

A I thought so.

Q Did you ever call the sister of the victim back?

A Luz Delcid?

Q Yes.

A I talked to her off and on.

Q Did you ever attempt to follow up to see if anyone had taken any action on the information you provided through her?

A No.

Q If Guatemala was looking for him, anything of that sort?

A No.

Q And you didn't give any information to the Dallas Sheriff's Office that he was in Guatemala, correct?

A No.

Q Did you give any information to the DA?

A No.

Q And is it your understanding that Guatemala is a member of the Interpol network?

A I suspect, I think it is, yeah.

Q You have no reason to dispute any information that they are not, correct?

A No.

Q And are you familiar with the red notice from Interpol?

A Pardon me?

Q Red notice, have you ever heard that expression before?

A No.

Q. And are you familiar with the Department of Justice, Criminal Division, Office of Internal Affairs?

A No.

Q International Affairs, I'm sorry.

A No.

Q And you know an embassy is considered United States territory, correct?

A Yes.

Q Now, Irving had the unfortunate incident of an officer being shot and killed, correct?

A Yes, it did.

Q I imagine that if -- when these people were rumored to head south, the Irving Police Department started to take action, correct?

A Yes, it did.

Q Were you involved in that?

A No.

Q And I guess had these people fled to Mexico or Guatemala, the Irving Police Department would have taken more action, correct?

A I would assume so.

Q And you would assume that they would have gotten the federal authorities involved?

MS. WILBANKS: Objection, relevance.

THE COURT: Overrule the objection.

A Could you repeat that?

Q You would assume that they would have gotten the federal authorities involved, correct?

A They were involved.

Q In the investigation of the -- they caught at least seven, it ended up being six, correct?

A Yes.

Q And they got them involved right away, correct?

A They were involved beforehand but, yes, they figured it out.

Q Now, it's your understanding that had someone gone to look for the defendant in a village in Guatemala, they could have found him in minutes, correct?

A I don't have any idea.

Q Now, the climate in Guatemala at that point in 1995, do you have any information on that?

A No, I don't.

Q You weren't aware of an American citizen who was spotted on the FBI's ten most wanted list that was pursued by the Guatemalan authorities?

A I don't know anything about that.

Q And you weren't aware of an American nun being killed about a month before this incident?

A No, I don't.

Q And the FBI being down there to investigate?

A No, I don't.

Q But it's your understanding that you can get FBI involved down in a foreign country, correct?

A That's what I understand, yes.

MR. MONTALVO: Pass the witness.

THE COURT: Anything further from this witness?

MS. WILBANKS: Yes, your Honor.

REDIRECT EXAMINATION

BY MS. WILBANKS:

Q Detective Renfroe, when you were originally trying to find the defendant here in the U.S., did you pull up accident records involving the car that was involved in the murder?

A Yes, I did.

Q And did you follow up on those addresses in that accident report?

A Yes.

Q Why didn't you contact Interpol?

A I just didn't. He was out of the country.

Q Have you contacted Interpol in other cases where someone's fled the country?

A No, I haven't.

Q Why not give the information about the defendant's whereabouts to the district attorney's office?

A I don't recall why I didn't. I don't remember.

Q But you had sent that information to the U.S. Embassy, to the State Department. And was there anything about what you were doing that the DA's office could have done?

A No, there wasn't.

Q This case has been set for trial before; is that right?

A Yes.

Q And you were here on that trial setting.

A Yes.

Q And we've talked extensively about this case.

A Yes.

Q To your knowledge, are all the witnesses in this case that you have listed in your report still available?

A Yes, they are.

Q And all of them have been found.

A Yes.

Q And you have actually seen some of them down here at the courthouse; is that right?

A Yes, ma'am.

MS. WILBANKS: No further questions.

RECROSS-EXAMINATION

BY MR. MONTALVO:

Q You understand how a person's memory could be hampered after almost ten years, correct?

A Sure.

Q You understand how someone could be prejudiced by that, correct?

A I don't know what you mean prejudiced.

Q They could suffer harm for not being able to recollect something almost ten years ago.

A I don't know how they can be harmed, but –

Q But you could understand that.

A I guess, yes.

MR. MONTALVO: We pass the witness. We would like to offer Defendant's Exhibits F, E and K into evidence. And L, we are offering that one too to the State for any objections.

MS. WILBANKS: Judge, we object to these because there's been a lack of authentication on them. There is a lack of relevance on them. These appear to be maybe printouts off the Internet. There is no authenticity to them. There has not been a witness who has sat on the stand to sponsor these specific exhibits.

THE COURT: I'll overrule the objection.

MR. MONTALVO: We pass the witness.

THE COURT: Witness passed. Anything further from this witness?

MS. WILBANKS: Your Honor, may I approach?

THE COURT: Yes.

MS. WILBANKS: May I have those last exhibits?

REDIRECT EXAMINATION

BY MS. WILBANKS:

Q Detective Renfroe, I'm showing you what's been marked as Defendant's Exhibit F. I'm looking at page three of that. There is a part here that says, "Can Interpol refuse to issue a red notice". Do you see that?

A Yes.

Q Please read the first paragraph.

A "Interpol's general secretariat has been empowered by the organization's general assembly to refuse to issue a red notice when it is not satisfied that the notice contains all the information needed to formulate a valid request for provisional arrest".

Q So basically what that says is they need some information before they issue a red notice.

A Yes.

MS. WILBANKS: No further questions.

MR. MONTALVO: May I just have one second, your Honor?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. MONTALVO:

Q Officer, you would agree that the possibility of a refusal is not the equivalent of asking and receiving a rebuff, correct?

A I would say yes.

MR. MONTALVO: Pass the witness.

MS. WILBANKS:. No further questions.

THE COURT: Any objections to this witness being released?

MS. WILBANKS: No objection.

MR. MONTALVO: None from the defense, your Honor.

THE COURT: Thanks. You're free to go back home, wherever you need to go.

* * * *

APPENDIX E

REPORTER'S RECORD

VOLUME 8 OF 10 VOLUMES

TRIAL COURT CAUSE NO. F01-01091-R

THE STATE OF TEXAS	|	IN THE DISTRICT COURT
VS.	|	OF DALLAS COUNTY, TEXAS
RAFAEL GONZALES	|	265TH JUDICIAL DISTRICT

GUILT/INNOCENCE

On the 13th day of July 2005, the following proceedings came on for hearing in the above-entitled and numbered cause before the Honorable Glen Ashworth, sitting for the Honorable Keith Dean, and a jury, held in Dallas, Dallas County, Texas:

Proceedings reported by oral stenography.

[Reporter's Record, Volume 8, Page 62]

* * * would, if the evidence proved to you beyond a reasonable doubt, return a conviction of one eye -- based on the evidence of one eyewitness. All of you twelve are sitting here because you promised that you could. But we have two.

We don't have physical evidence -- that much physical evidence in this case, do we? Why not?

Now you understand, after hearing this case and hearing the evidence in this case, why we don't have guns in every single murder case. Now you understand why it is sometimes hard for jurors like you, who are twelve common citizens, have to stand up and listen to a case without a murder weapon. Without hand wipings from the Defendant. Without fingerprints.

We never did find the white car. We never did find the maroon car. We looked real hard, but we didn't. Why? Because he left. He fled. He got out of here as soon as he could.

A verdict of not guilty in this case rewards him for getting away. You guys all understand that. The other most important thing about this case is, you know, it was ten years ago.

We asked three of the jurors to describe what I was wearing when I was giving the voir dire. You guys all remember that. Six feet, you know, six-one, * * * *

APPENDIX F

Case No. W01-01091-R(A)
(The Clerk of the convicting court will fill this line in.)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

APPLICATION FOR A WRIT OF HABEAS CORPUS
SEEKING RELIEF FROM FINAL FELONY CONVICTION
UNDER CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

NAME: Rafael Arriaza Gonzalez
DATE: 3-25-65
PLACE OF CONFINEMENT: Dick Ware Unit TDCJ

TDCJ-CID NUMBER: 1316090
SID NUMBER:_____

(1) This application concerns (check all that apply):

☑ **a conviction**	☐ **parole**
☑ **a sentence**	☐ **mandatory supervision**

□ time credit ☑ **out-of-time appeal or petition for discretionary review**

(2) **What district court entered the judgment of the conviction you want relief from?** (Include the court number and county.)
In the 265th Judicial District Court of Dallas County Texas

(3) **What was the case number in the trial court?**
F01-01091-TR

(4) **What was the name of the trial judge?**
Judge Keith Dean

(5) **Were you represented by counsel? If yes, provide the attorney's name:**
Dan Montalvo 2414 N. Akard, Suite 700 Dallas, Tx 75201

(6) **What was the date that the judgment was entered?**
7-14-2005

(7) **For what offense were you convicted and what was the sentence?**
Murder

(8) **If you were sentenced on more than one**

count of an indictment in the same court at the same time, what counts were you convicted of and what was the sentence in each count?

N/A

(9) What was the plea you entered (Check one.)

☐ **guilty-open plea**	☐ **guilty-plea bargain**
☑ **not guilty**	☐ **nolo contendere/ no contest**

If you entered different please to counts in a multi-count indictment, please explain:_

_____

_____

(10) What kind of trial did you have?

☐ **no jury**	☑ **jury for guilt and punishment**
☐ **jury for guilt, judge for punishment**	

(11) Did you testify at trial? If yes, at what phase of the trial did you testify.

Not guilty was my statement

(12) Did you appeal from the judgment of conviction?

☑ yes ☐ no

If you did appeal, answer the following questions:

(A) What court of appeals did you appeal to?

Fifth District of Dallas

(B) What was the case number?

No. 05-05-01140-CR

(C) Were you represented by counsel on appeal? If yes, provide the attorney's name:

Russ Henrichs P.O. Box 190983 Dallas Tx 75219

(D) What was the decision and the date of decision?

Affirm

(13) Did you file a petition for discretionary review in the Court of Criminal Appeals?

☐ yes ☑ no

If you did file a petition for discretionary review, answer the following questions:

(A) What was the case number? _____

_____

(B) What was the decision and the date of the decision? _____

(14) Have you previously filed an application for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure challenging *this conviction*?

☑ yes ☐ no

If you answered yes, answer the following questions:

(A) What was the Court of Criminal Appeals writ number? W01-01091-R(A)

(B) What was the decision and the date of the decision? Returned for correction

(C) Please identify the reason that the current claims were not presented and could not have been presented on your previous application.

The reason that the current claim was not excepted in previous application it needed some correction

(15) Do you currently have any petition or appeal pending in any other state or federal court?

☐ yes ☑ no

If you answered yes, please provide the name of the court and the case number:

_____

(16) If you are presenting a claim for time credit, have you exhausted your

administrative remedies by presenting your claim to the time credit resolution system of the Texas Department of Criminal Justice? (This requirement applies to any final felony conviction, including state jail felonies)

☐ yes ☑ no

If you answered yes, answer the following questions:

(A) What date did you present the claim?

_____

(B) Did you receive a decision and, if yes, what was the date of the decision?

_____

If you answered no, please explain why you have not submitted your claim:

_____

_____

_____

_____

_____

(17) Beginning on page 6, state *concisely* every legal ground for your claim that you are being unlawfully restrained, and then briefly summarize the facts supporting each ground. You must present each ground on the form application and a brief summary of the facts. *If your grounds and brief summary of the facts have not been*

presented on the form application, the Court will not consider your grounds. **If you have more than four grounds, use page 10 of the form, which you may copy as many times as needed to give you a separate page for each ground, with each ground numbered in sequence.**

You may attach a memorandum of law to the form application if you want to present legal authorities, but the Court will *not* consider grounds for relief in a memorandum of law that were not stated in the form application. If you are challenging the validity of your conviction, please include a summary of the facts pertaining to your offense and trial in your memorandum.

GROUND ONE: The States witness Luz Del Cid knowingly and unquestionably made a false report to Peace Officer and Did Tamper with or fabricate physical evidence of crime seens

FACTS SUPPORTING GROUND ONE:

At this time, Mr. Rafael Arriaza Gonzalez would show this Honorable Appeals Court that all statements of alleged facts is nune other then a false report to a Peace Officer such as the states witness Luz Del Cid knowingly and unquestionably made a false report to Peace Officer implicating Applicant to the murder of said Roberto Velazquez. Sec 37.08 Tex P.C. False Report to Peace Officer or law enforcement employee.

A). A person commits an offense if wich intents to decive she knowingly makes a false statement that is material to a criminal investigation and makes the statement to;

1). a peace officer conducting the investigation; or

2). any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor Knows is conducting the investigation;

b). In this section "Law enforcement agency" has the meaning assigned by Article 59.01 Code of Criminal procedure.

c). An offence under this section is a class B misdemeanor Sec. 37.09 Tampering with or fabricating physical evidence.

A). A person commits an offense if Knowing that an investigation or official proceeding is pending or in progress she: 1) alters, destroys, or conceals any

record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or knowledge of its falsity and with intent to affect the courts course or outcome of the investigation or official proceeding.

b) This section shall not apply if the record, document or thing concealed is privileged or is the work product of the parties to the investigation or official proceeding.

c). An offence under subsection (A) or subsection (d)(1) is a felony of the third degree.

GROUND TWO:

Ineffectiveness assistance of Councel standards of Practice to be observed by all Attorneys in a Court of law...

FACTS SUPPORTING GROUND TWO:

The Applicant, Rafael Arriaza Gonzalez, will futher show this Appeals Court how ineffectiveness assistance of counsel with fu ther harm of an Appeal attorney that was not flamilurized with all the facts of this case. But was more concerned with a quick desposal of this appeal.

A). In fulfilling his o her primary duty to the client, a lawyer must be ever conscious of the broader duty to the Judicial System that serves both attorney and client.

B). A lawyer owes to the judiciary, candor, diligence and utmos respect.

C). A lawyer owes to opposing counsel, a duty of courter and cooperation, the observing of which is necessary for the efficient administration of our system of Justice and the respect of the public it serves;

D). A lawyer unquestionably owes, to the administration of Justice the fundamental duties of personal dignity and professional integrity.

E). Lawyers should treat each other the opposing party the court and members of the court staff with curtesy and civity and conduct themselves in a professional mannor at all times.

F). A client has no right to demand that cousel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and

suitors with fairness and due consideration.

G). In adversary proceeding client are litigants and though ill fillings may exist between clients such ill feelings should not influence a lawyer's conduct attitude, or demeanor towards opposing lawyers.

H). A lawyer should not use any form of discovery or the scheduling appearances and will recognize that neglect and tardiness they are demeaning to the lawyer and to the Judicial system.

It is more then apparent that the administration of Justice and the fundamentals duties of professional integrity of personal dignity was withdrawn in accordance with the provision of ineffective assistance of counsel.

In not only one count but two counts of ineffectiveness. Now this leaves great question as to the state witness and the credibility of that said witness clearly look at the brief, for the following points of error in which will totally discredit the states witness.

GROUND THREE:

No evidence or insufficient evidence pursuant to an unlawful arrest & Conviction.

FACTS SUPPORTING GROUND THREE:

States witness, Luz Del Cid, And her statement of fact Presented For Review...

On June 12, 1995, Roberto Alcides Velasquez was gunned down near the Garden Plaza Apartment in Irving, Texas. Luz Del Cid, sister of the deceased, testified that her brother was shot at point-blank by the applicant. Charles Clow with forensic science testified that the bullet removed during autopsy of the victum and state exhibit 25 a 9mm caliber.

Who was sented in a car Mrs. Del Cid said she was standing behind her brother he fell back into her, mortally wounded.

Ms. Darlene Nicole Keener at 14-15 years old teenager at the time was an eyewitness with a conflicting statement "She could not recall a female coming up to the car <vol. 7, RR 130>. Ms. Darlene Nicole Keener also made a statement she was at the park on the apartment complex grounds <vol. 7, RR 126-127>. Ms. Darlene Nicole Keener stated that she saw a gray car pull up. The driver got out and walked to the breezeway and then two Hispanic men walked to the Breezeway and were arguing in Spanish <vol. 7, RR 128>. Then the driver got back into his car <vol. 7, RR 128> Ms. Darlene Nicole Keener states, "she wasn't paying attention" but when she heard gunshots, she looked up...

She then speculates the driver shot the gay who was

standing by the drivers window <vol. 7 RR 128>.
In Websters Dictionary the word speculate; to reflect or think deeply; to take a chance on a business venture in hopes of making a large Profit. So when she reflected back and started to think deeply she gussed and took a chance to say the man in the car shot the man standing. Did she say, when she was playing in the park she wasn't paying attention but after she heard the gunshots she then looked up my question how is it possible to see with your ears not your eyes?

GROUND FOUR:

FACTS SUPPORTING GROUND ~~FOUR~~ Three:

Now Mrs. Luz Del Cid states the applicant was in a white Honda with a black line and Rigoberto Ramirez was in a red car. She said <vol. 7 RR 66>

Notice Ms. Darlene Nicole Keener said in <vol. 7 RR 126-128> that she saw the applicant in a gray car. Not a white car with a black line. Mrs. Luz Del Cid states that she left work at approximate 7:30 pm. Went to pick up her children and went to McDonalds and a Furniture store <vol. 7, RR 64-65>. She saw the appellant and againd, Rigoberto asked her about her brother and she told him that he was at the house meaning her apartment <vol. 7, RR 65>. The appellant and Rigoberto were in separate cars <vol. 7 RR 65>. The appellant was in a white Honda with a black line and Rigoberto (Ramirez) was in a red car she said <vol. 7, RR 66>. In Rigoberto's car was another friend of the appellant Albino Chivarerra <vol. 7, RR 66>.

Now for her "Mrs. Luz Del Cid" not to have been seen at the crime seen until later taken the boots off the Gundown man Roberto <vol. 7, RR 137> Ms. Keener when she looked over she saw the victim laying on the breezeway, she said a lady took his boots off and ran the other side of the apartments. The same woman states that her brother told her, "Take my boots off because I have some money there for Mom" Mrs. Del Cid said she took 2,500^{00} From the boots and later gave the money to the police when they came to her apartment <vol.7, RR 71>

Harold Renfroe "Detective" of the Irving Police Dept. stated Mrs. Del Cid admitted taking money from her brother's boot. He seized the money from her apartment and placed it into the property room. Detective Renfroe said that the amount of money was approximately 1,500 <vol. 7, RR 174>.

Was there more in that boot then what was said what became of the contents in the other boot.

GROUND:

_____

_____

FACTS SUPPORTING GROUND: Three Detective Renfroe said that following the killing he learned that another Hispanic man was at the crime scene; a man named Cordova was at the crime scene <vol. 7, RR 189> Mrs. Luz Del Cid told Detective Renfroe that she took off one boot saw money in it and put it into her pocket. Before she could get the other one off Martin grabbed that one and they left <vol. 7, RR 190-191>. The police took 1,569^{00} from her <vol. 7, RR 191>

Now the question remains is it possable that Martin Cordova and Mrs. Luz Del Cid shot and killed the victim for the contents in his boots. And planned an alibi or give an excuse or defraud a public official. A deliberate and willful deception perpetrated for unlawful gain...

WHEREFORE, APPLICANT PRAYS THAT THE COURT GRANT APPLICANT RELIEF TO WHICH HE MAY BE ENTITLED IN THIS PROCEEDING.

VERIFICATION

(Complete EITHER the "oath before a notary public" OR the "inmate's declaration.")

OATH BEFORE NOTARY PUBLIC

STATE OF TEXAS, COUNTY OF Mitchell.

_____, BEING FIRST DULY SWORN, UNDER OATH, SAYS: THAT HE/SHE IS THE APPLICANT IN THIS ACTION AND KNOWS THE CONTENT OF THE ABOVE APPLICATION AND ACCORDING TO APPLICANT'S BELIEF, THE FACTS STATED IN THE APPLICATION ARE TRUE.

/s/ Rafael Arriaza Gonzalez
Signature of Applicant

SUBSCRIBED AND SWORN TO BEFORE ME THIS____ DAY OF _____.

_____
Signature of Notary Public

INMATE'S DECLARATION

I, Rafael Arriaza Gonzalez, BEING PRESENTLY INCARCERATED IN TDCJ-ID, DECLARE UNDER PENALTY OF PERJURY THAT, ACORDING TO MY BELIEF, THE FACTS STATED IN THE APPLICATION ARE TRUE AND CORRECT.

SIGNED ON: 7-03-07

/s/ Rafael Arriaza Gonzalez
Signature of Applicant

_____

Signature of Attorney

Attorney Name: _____

SBOT Number: _____

Address: _____

_____

_____

Telephone: _____

APPENDIX G

W-01-01091-R(A)

Rafael Arriaza Gonzalez Applicant,	§	Court of Criminal Appeals of Texas
vs.	§	In the 265th Judicial District
The State of Texas Appelle	§	Court of Dallas County Texas

Application for a Writ of Habeas Corpus Seeking Relief from Final Felony Conviction Under Code of Criminal Procedure Art. 1107 V.A.C.C.P.

To the Honorable Judge of said Court:

Now comes the applicant, Rafael Arriaza Gonzalez, by and through this pro se Application writ of Habeas Corpus 11.07 V.A.C.C.P and Respectfully submits his Application setting out points of error of which the Applicant complains on appeal. The applicant is seeking to bring issues of new discovered evidence that was not brought up in the Applicant's Brief. So that he may Reverse his conviction in cause NO. W01-01091-R(A) for the Felony offense of murder in the 265th Judicial District Court of Dallas, the Honorable Judge Keith Dean, judge presiding. The jury set punishment at 30 years in the Institutional Division of the Texas Department of Corrections and no fine <R 114, 116>.

The applicant was sentenced on July 14, 2005, at which time he gave timely notice of appeal <R 116>.

I.

Statement of the Case

Offence	Murder
Enhancement	None
Trial of Guilt/Innocence	Jury
Finding on Guilt	Guilty
Trial on Punishments	Jury
Punishment	30 years in the Intitutional Division of Texas Department of Corrections and no fine.

II

Previous Issues Presented For Review in Appellant's Brief No. 05-05-01140-CR In the fifth District Court of Appeals at Dallas, Texas

I. The appellant was denied his Constitutional Right to a Speedy Trial.

III.

Statement of alleged facts of this case brought by Ineffective Appeal Attorney Russ Henrichs P.O. Box 190983 Dallas, Texas 75219.

Respectfully see brief for appellant No. 05-05-01140-CR that is in the court of appeals fifth District of

Texas at Dallas, Texas. And the facts with in this case listed.

IV.

Rule 78 Tex Rules of App. Pro Judgment In The Court of Criminal Appeals.

The Court of Criminal Appeals may:

A). Affirm the lower court's judgment in whole or in part

B). Modify the lower court's judgment and affirm it as modified;

C). Reverse the court's judgment in whole or in part and render the judgment that the lower Court should have rendered;

D). Reverse the lower court's judgment and remand the case for further proceedings:

E). Vacate the judgment of the lower court and dismiss the case;

F). Vacate the lower court's judgment and remand the case for further proceeding in light of changes in the law; or

G). dismiss the appeal or 11.07

V

Remand in the interest of Justice

When reversing the Court of appeals' judgment, the court of Criminal Appeals may, in the interest of justice, remand the case to the trial Court even if a rendition of judgment is other wise appropriate.

The Court of Criminal Appeals may make any other appropriate order required by law and the

nature of the case.

VI

Statement of fact

At this time, Mr. Rafael Arriaza Gonzalez, would show this Honorable Appeal Court that all statements of alleged facts is nune other than a false report to a Peace Officer. Such as the states witness Luz Del Cid knowingly and unquestionably made a false report to Peace Officer implicating Applicant to the murder of said Roberto Velasquez.

Sec. 37.08 Tex. P.C. False report to Peace Officer o law enforcement Employee.

A). A person commits an offense if which intent to dece she knowingly makes a false statement that is material to a Criminal investigation and makes the statement to:

1) a peace officer conducting the investigating; or

2 any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation.

b). In this section "law enforcement agency" has the meaning assigned by Article 59.01 Code of Criminal Procedure.

C). An offence under this section is a class B misdemeanor.

Sec. 37.09 Tampering with or fabricating Physical Evidence.

A). A person commits an offense if knowing that an investigation or official proceeding is pending or in progress, she;

1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

2) makes, presents, or use any record, document or thing with knowledge of its falsity and with intent to affect the courts course or outcome of the investigation or official proceeding

b). This section shall not apply if the record, document, or thing concealed is privileged or is the work product of the parties to the investigation or official proceeding;

c) An offence under subsection (A) or subsection (d)(1) is a felony of the third degree.

VII

Standards of Practice to be observed by all Attorneys in a Court of law...

The Applicant, Rafael Arriaza Gonzalez, will further show this Appeals Court how ineffectiveness assistance of counsel with further harm of an Appeal attorney that was not flamilurized with all the facts of this case. But was more concerned with a quick disposal of this appeal.

A). In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the Judicial system that serves both attorney and client.

B). A lawyer owes, to the Judiciary, candor, diligence, and uptmos Respect.

C). A lawyer owes to opposing counsel, a duty of courtes and cooperation, the observing of which is necessary for the efficient administration of our system of Justice and the respect of the public it serves.

D). A lawyer unquestionably owes, to the administration of Justice the fundamental duties of personal dignity and professional integrity.

E). Lawyers should treat each other the opposing party, the court and members of the court staff with courtesy and civility and conduct themselves in a professional mannor at all times.

F). A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

G). In adversary proceeding client are litigants and

though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct attitude, or demeanor towards opposing lawyers.

H). A lawyer should not use any form of discovery or the scheduling of discovery, as a means of harassment of the opposing counsel or counsel's client.

I). Lawyers will be punctual in communications with others ana in honoring scheduled appearances, and will recognize that neglect and tardiness they are 93usiness93 to the lawyer and to the Judicial System.

It is more then apparent that the administration of justice and the fundamental duties of Professional integrity of personal dignity was withdrawn in accordance with the Provision of ineffective assistance of counsel. In not only one count but two counts of ineffectiveness.

Now this leaves great question as to the states witness and the credibility of that said witness. Clearly look at the brief for the following points of error in which will totally discredit the states witness.

States witness, Luz Del Cid, And her statement of fact Presented for Review...

In June 12, 1995, Roberto Alcides Velazquez, was gunned down near the Garden Plaza Apartments in Irving, Tx Luz Del Cid, Sister of the deceaCed, testified that her brother was shot at point blank by

the applicant

Charles Clow with Forensic science testified that the bullet removed during autopsy of the victum and states exhibit 25, a 9mm. caliber

Who was seated in a car mrs. Del Cid said she was standing behind her brother he fell back into her, mortally wounded.

Ms. Darlene Nicole Keener at 14-15 year old teenager at the time was an eyewitness with a conflicting statement "she could not recall a female coming up to the car. <vol. 7, RR 130>.

Ms. Darlene Nicole Keener also made a statement she was at the park on the apartment complex grounds <vol. 7, RR 126-127>.

Ms. Darlene Nicole Keener states that she saw a gray car pull up. The driver got out and walked to the breezeway and then two Hispanic men walked to the breezeway and were arguing in Spanish <vol. 7, RR 128>. The driver got back into his car<vol. 7, RR 128> Ms. Darlene Nicole Keener states;

"she wasn't paying attention," but when she heard gunshots, she looked up...

She then speculates the Driver shot the guy who was standing by the driver's window <vol. 7, RR 128>.

In Websters Dictionary the word Speculate; To reflect and think deeply; to take a chance on a bussiness venture in hopes of making a large profit. So when she reflected back and started to think

deeply she guessed and took a chance to say the man in the car shot the man standing. Did she say that when she was playing in the park she wasn't paying attention. but after she heard the gunshots she then looked up. My question how is it possible to see with your ears not your eyes?

Now Mrs. Luz Del Cid states the Applicant was in a white Honda with a black line and Rigoberto Ramirez was in a red car, she said <vol. 7, RR 66>

Notice Ms. Darlene Nicole Keener said in <vol. 7, RR 126-128> that she saw the Applicant in a gray car. Not a white car with a black line.

Mrs. Luz Del Cid states that she left work at approximate 7:30 pm. went to pick up her children and went to McDonalds and a furniture store <vol. 7, RR 64-65>. She saw the appellant and <u>againd</u> Rigoberto asked her about her brother and she told him that he was at the house meaning her apartment <vol. 7, RR 65> The appellant and Rigoberto were in separate cars <vol. 7, RR 65>. The appellant was in a white Honda with a black line and Rigoberto (Ramirez) was in a red car, she said <vol. 7, RR 66>. In Rigoberto's car was another friend of the appellant. Albino Chivarerra <vol. 7, RR 66>.

Now, for her "Mrs. Luz Del Cid" not to have been seen at the crime seen until later taken the boots off of the Gun down man. Roberto.

<vol. 7, RR 137> Ms Keener when she looked over

she saw the victim laying on the breezeway, she said a lady took his boots off and ran to the other side of the apartments.

This same woman states that her brother told her, "Take my boots off because I have some money there for mom" Ms. Del Cid said she took 2,500^{00} from the boots and later gave the money to the police when they came to her apartment <vol. 7, RR 71>

Harold Renfroe "Detective" of the Irving Police Dept. stated Ms. Del Cid admitted taking money from her brother's boot. He seized the money from her apartment and placed it into the property room. Detective Renfroe said that the amount of money was approximately 1,500 <vol. 7, RR 174>.

Was there more in that boot then what was said. What became of the contents in the other boot

Detective Renfroe said that following the killing he learned that another Hispanic man was at the crime scene; a man named Cordova, was at the crime scene <vol. 7, RR 189> Mrs. Luz Del Cid told Detective Renfroe that she took off one boot. Saw money in it and put it in her pocket. Before she could get the other one off Martin grabbed that one and they left <vol. 7, RR 190-191>. The police took 1,569.00 from her <vol. 7, RR 191>

Now the question remains is it possible that Martin Cordova and Mrs. Luz Del Cid shot and killed the victim for the contents in his boots. And planned

an alibi or give an excuse or even defraud a public official. A deliberate and willful deception perpetrated for unlawful gain...

"Prayer"

Applicant Rafael Arriaza Gonzalez, so moves this Appeal court of the Fifth District of Texas at Dallas, Texas.

Prays that this honorable court will examine and review the facts of this case. There after determin rather or not a reversal of this cause is so required when the court finds that the points of error and the statements of fact's are in error and or question, of Applicants innocence. The Applicant prayers that this cause be reversed and remanded, or alternatively that an acquittal be entered.

Respectfully submitted,
/s/ Rafael Arriaza Gonzalez
Rafael Arriaza Gonzalez
Pro-se Applicant

NOTICE
OFFENDER NOTARY PUBLIC SERVICE

Under both Federal law (28 U.S.C. § 1746) and State Law (V.T.C.A. Civil Practice & Remedies Code, § 132.001-132-003). Offenders incarcerated in Texas may use an unsworn declaration under penalty of perjury in place of a written declaration, verification, oath, or affidavit sworn before a Notary Public. An example of an unsworn declaration is as follows:

"I Rafael Arriaza Gonzalez #1316090 (insert offender name and TDCJ number), being presently incarcerated in Dick Ware insert TDCJ unit name), in Mitchell county, Texas declare under penalty of perjury that the foregoing is true and correct.

Executed on January 22nd, 2007

/s/ Rafael Arriaza Gonzalez"

Rafael Arriaza Gonzalez

In a request for Notary Public Service, each offender must explain why an unsworn declaration is insufficient before Notary Public Service will be provided.

APPENDIX H

WRIT NO. 2-01-01091-R(A)

EX PARTE	§ IN THE 265th JUDICIAL
	§ DISTRICT COURT
RAFAEL ARRIAZA GONZALEZ	§ DALLAS COUNTY, TEXAS

STATE'S RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS

The State, having considered the allegations contained in Applicant's Application for Writ of Habeas Corpus in the above numbered and entitled cause, makes the following response:

I.
HISTORY OF THE CASE

A jury convicted Applicant of the offense of murder and sentenced him to thirty years' confinement in the Texas Department of Criminal Justice, Institutional Division. His conviction was affirmed by the Court of Appeals in an unpublished opinion. (*See* No. 05-05-01140-CR, *Gonzales v. State*, attached hereto and incorporated herein as Exhibit 1). This is his first Application for Writ of Habeas Corpus. Applicant previously attempted to file another Application but the Court of Criminal

Appeals refused to accept it because it failed to comply with rule 73 of the Texas Rule of Appellate Procedure. TEX. R. APP. PROC. 73.

II.
ISSUES RAISED IN APPLICATION

Applicant contends that: (1) the State's witnesses tampered with the evidence; (2) he was deprived of effective assistance of counsel on direct appeal; and (3) there was no evidence or insufficient evidence to support the conviction.

III.
STATE'S RESPONSE

General Denial

The State makes a general denial of Applicant's allegations in their entirety. Applicant has not provided sufficient proof to merit consideration of his claims. In any post-conviction collateral attack, the burden of proof is on the applicant to allege and prove facts, which if true, entitle him to relief. *See Ex parte Maldonado*, 688, S.W. 2d 114, 116, Tex. Crim. App. 1985). The standard of proof is by a preponderance of the evidence. *See Ex parte Adams*, 768 S.W. 2d 281, 287-88 (Tex. Crim. App. 1989). Applicant has failed to meet his burden of proof by a preponderance of the evidence. Accordingly, his request for habeas relief should be denied.

Discrepancies in the Testimony

Applicant contends that a State's witness gave a false statement as shown by discrepancies between her testimony and that of another witness. The State would note that any such discrepancies were placed before the jury at trial and, clearly, resolved against Applicant. Moreover, Applicant's complaint is not cognizable on a writ of habeas corpus. *See Ex parte Banks*, 769 S.W.2d 539, 541-45 (Tex. Crim. App.1989) (holding that habeas corpus is available only to review jurisdictional defects or denials of fundamental or constitutional rights).

The purpose to be served by a post conviction writ of habeas corpus is limited, and "lies only to review jurisdictional defects or denials of fundamental or constitutional rights." *Ex parte Watson*, 601 S.W.2d 350 (Tex.Crim.App.1980). Failure to adhere to a legislative directive or mode of proceeding designed to safeguard a constitutional right will likewise be cognizable only when the omission results in the denial of a constitutional protection. *Ex parte Sadberry 864 S.W.2d 541 (Tex.Crim.App. 1993). Applicant's fourth ground for relief has no merit and should be denied. Ex parte Tovar, 901 S.W.2d 484 (Tex.Crim.App. 1995).*

Ineffective Assistance of Counsel

Applicant alleges that he was deprived of effective assistance of counsel both at trial and on direct appeal. A defendant's right to counsel is guaranteed by both the federal and state constitutions. *See* U.S. CONST. amend. VI, XIV; TEX. CONST. art. I, § 10. The U.S. Supreme Court has recognized that the "right to counsel is the right to the effective assistance of

counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). In so doing, the U.S. Supreme Court established a two-prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. First, the defendant must show a deficient performance of counsel, which requires showing that, considering all the circumstances and specific acts performed, counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See Strickland v. Washington*, 446 U.S. 668, 687 (1984). Second, the defendant must also show that this deficient performance, *i.e.*, counsel's errors, prejudiced the defense by depriving the defendant of a fair trial. *See Strickland*, 446 U.S. at 687. Unless the defendant makes both showings, it cannot be said that the conviction resulted from ineffective assistance of counsel. *See Strickland,* 446 U.S. at 687.

The *Strickland* test applies in Texas, both for the guilt/innocence phase and for the punishment phase of the trial. *See Hernandez v. State*, 988 S.W.2d 770, 772-73 (Tex.Crim. App. 1999); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). Essentially, a defendant must show: 1) that his counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms; and 2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687; *See also Hernandez*, 726 S.W.2d at 55, 57 (stating that the Texas Standard for ineffective assistance of counsel parallels the federal standard). A reasonable probability is defined as probability sufficient to

undermine confidence in the outcome. *See Strickland*, 466 U.S. at 687; *Hernandez*, 726 S.W.2d at 55, 57; *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992).

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *See Strickland*, 446 U.S. at 686. Proof of ineffective assistance of counsel requires a showing of harm-that the ineffectiveness of counsel contributed to the conviction or punishment or deprived the applicant of a fundamental right. A defendant must show omissions or other mistakes which amount to professional errors that raise a reasonable possibility that the outcome of the trial would be different but for the errors. *See Strickland*, 486, U.S. at 688. Furthermore, the defendant must affirmatively prove prejudice, as there is no assumption of prejudice unless no counsel was provided at all. Ineffective assistance of counsel can be found for many reasons, but the totality of the circumstances is viewed in determining the question. *See, e.g. Cannon v. State*, 668 S.W.2d 40 (Tex. Crim. App. 1984).

Applicant, however, fails to allege with specificity his claims of ineffective assistance of counsel. Rather, his simply cites to some of the rules of professional conduct without explaining why or how he considers that they were violated by his trial or appellate attorney. The State contends that Applicant was provided with effective assistance of counsel. The State further asserts that Applicant's Application fails to state a cognizable claim of

ineffective assistance and his second ground for relief should be denied.

Sufficiency of the Evidence

Applicant's third ground for relief challenges the sufficiency of the evidence. Sufficiency of the evidence is not properly raised in a habeas corpus application. Sufficiency of the evidence is waived if not raised on appeal. *See Ex parte McClain*, 869, S.W.2d 349, 351 (Tex. Crim. App. 1994). Traditionally, the writ of habeas corpus is available only to review jurisdictional defects or denials of fundamental constitutional rights. *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App. 1991). Habeas corpus is an extraordinary remedy, and a post-conviction application will not be considered where there is an adequate remedy of law, such as an appeal. Therefore, the purpose of habeas corpus review is to determine the lawfulness of confinement, not to substitute for a appeal. *Ex parte Clore*, 680 S.W.2d 899 (Tex. Crim. App. 1985); *Ex parte McGowan*, 645 S.W.2d 286 (1983). Applicant's third ground for relief should be denied.

IV.
CONCLUSION

The State respectfully requests this Court deny Applicant's Application for Writ of Habeas Corpus or make such findings as will see justice done in this case.

Respectfully Submitted,
CRAIG WATKINS

CRIMINAL DISTRICT
ATTORNEY
DALLAS COUNTY, TEXAS

/s/ Laura Anne Coats
LAURA ANNE COATS
ASSISTANT DISTRICT
ATTORNEY
STATE BAR NO. 00790476
FRANK CROWLEY COURTS
BUILDING
133 N. INDUSTRIAL BLVD., LB
19
DALLAS, TEXAS 75207-4399
(214) 653-3600

APPENDIX H-1

In The
Court of Appeals
Fifth District of Texas at Dallas

.....

No. 05-05-01140-CR

.....

RAFAEL ARRIAZA GONZALES a/k/a RAFAEL ARRIAZA GONZALEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

.....

On Appeal from the 265th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F01-01091-TR

.....

OPINION

Before Justices Wright, Moseley, and Lang
Opinion By Justice Lang

Rafael Arriaza Gonzalez[1] appeals his conviction for murder. A jury found appellant guilty and assessed punishment at thirty years' confinement. In his sole issue on appeal, appellant contends the

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[1] The record contains two different spellings of appellant's last name: (1) Gonzales, and (2) Gonzalez. We note that appellant uses the second spelling. Accordingly, we use that spelling in this opinion.

trial court erred in denying his motion to dismiss for violation of his right to a speedy trial. We decide against appellant on his sole issue and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 2, 1995, at approximately 12:30 p.m., Roberto Velasquez was killed near an apartment complex in Irving, Texas. Luz Del Cid, a sister of Velasquez, testified that she saw appellant shoot Velasquez several times from the front seat of a parked car as Velasquez stood near the car. A second eyewitness, Darlene Nicole Keener, was baby-sitting nearby and looked up when she heard the gunshots. After shooting Velasquez, appellant drove away.

Detective Harold Renfroe, a police officer with the City of Irving, showed separate photo lineups to Del Cid and Keener. Both witnesses identified appellant from the photo lineups. Del Cid said appellant and Velasquez had known each other since childhood and had lived in the same small community of Morazan, Guatemala.

Renfroe obtained a warrant for appellant's arrest and checked three addresses and several other locations in the Dallas area where he believed appellant might be found. However, he was unable to locate appellant. Del Cid then told Renfroe that she had heard that appellant had gone to California.

Appellant was indicted for murder on June 28, 1995. Also on that date, Renfroe posted appellant's warrant on TCIC and NCIC, state and national criminal databases for law enforcement. On July 26, 1995, appellant's warrant was sent to the Dallas Sheriff's Office to be served. Officers went to the address listed on the warrant on August 10, 1995, in an attempt to serve the warrant. Because appellant

was not found at that address, the warrant was then sent to the Violent Crimes Unit of the Dallas Sheriff's Office, which was responsible for trying to ascertain additional information to locate individuals in such cases.

In August 1995, Del Cid was contacted by her mother, who lived in Morazan, Guatemala. Del Cid's mother told Del Cid that she had seen appellant recently in Guatemala, and that he had threatened her on several occasions. Del Cid relayed this information to Renfroe. Renfroe called the U.S. Embassy in Guatemala and spoke to Lance Ruth. Renfroe told Ruth there was a warrant out for appellant and appellant had been seen in Guatemala. On March 6, 1996, Renfroe learned from a representative of a Dallas bonding business that Albino Chivarerra, an acquaintance of appellant who was also being sought in connection with the Velasquez murder, was possibly in Morazan, Guatemala. Renfroe called the U.S. Embassy in Guatemala and the U.S. State Department office in Dallas, Texas, and informed them of Chivarerra's possible location. Between March 6, 1996, and March 30, 2001, Renfroe obtained no additional information as to appellant's whereabouts and had no further involvement in the case.

Renfroe did not inform the Dallas Sheriff's Office that appellant had been seen in Guatemala. The Violent Crimes Unit of the Dallas Sheriff's Office ran a nationwide database search under appellant's name on April 16, 1997, but no new information was found. On February 7, 2001, appellant's Guatemalan passport was stamped by the U.S. Embassy in Guatemala to indicate that a visa application was

received from appellant on that date. However, the U.S. Embassy did not contact Renfroe or the Dallas Sheriff's Office at that time.

Appellant was incarcerated in Guatemala on March 8, 2001, for three murders not connected with this case. The Dallas Sheriff's Office was contacted by the U.S. Federal Bureau of Investigation on March 30, 2001, and told that appellant was in custody in Guatemala. The Dallas Sheriff's Office then contacted Jeff Shaw, chief investigator with the Dallas County District Attorney's Office, and informed him of appellant's location.

Shaw called the U.S. Justice Department's Office of International Affairs in Washington, D.C., on April 3, 2001, and notified them that appellant had been found. On May 8, 2001, the Office of International Affairs sent provisional arrest documentation to Guatemala.

A new warrant was issued for appellant on June 6, 2001. Although appellant was known to be in jail in Guatemala, officers from the Dallas Sheriff's Office again went to appellant's last known address in Garland, Texas, to attempt execution of that warrant. The Dallas County District Attorney's Office received notice on June 26, 2001, that provisional arrest documents had been served on appellant in Guatemala. The District Attorney's Office sent formal extradition documents to the Guatemalan Attorney General on July 24, 2001. On September 26, 2001, the Guatemalan court sent the Dallas County District Attorney's Office initial court approval of the provisional arrest documents. Although it is not clear when the Guatemalan government found in favor of appellant's extradition

to the United States, appellant filed an appeal of extradition on October 8, 2001.

The Office of International Affairs sent an e-mail to the Guatemalan Embassy on September 4, 2002, inquiring as to the status of appellant's appeal of extradition. The Embassy replied that the appeal was in its final stages. On August 25, 2003, the Office of International Affairs sent an e-mail to the Guatemalan Minister of Foreign Relations inquiring as to the status of appellant's extradition. The Office of International Affairs was told that appellant had filed another appeal, which was pending.

On April 30, 2004, Tom Black of the Office of International Affairs asked the Guatemalan Attorney General to investigate the matter of appellant's extradition. On May 12, 2004, the Guatemalan Attorney General sent a letter to Black, stating that the extradition papers required the signature of Guatemalan President Portillo, who had been removed from power in January 2004. At the request of Black, the U.S. ambassador to Guatemala asked the new Guatemalan government to get involved. Appellant's extradition papers were signed on July 13, 2004. On July 29, 2004, appellant was placed in jail in Dallas.

Appellant's trial was initially set for December 6, 2004. On December 7, 2004, the case was reset by agreement and without objection for March 7, 2005. The record is unclear as to why trial did not commence on March 7, 2005. However, appellant did not object to a second resetting of his trial.

On March 14, 2005, appellant filed a motion to dismiss alleging violation of his right to a speedy trial. The trial court heard evidence regarding

appellant's motion to dismiss on March 25, 2005, March 31, 2005, and April 22, 2005. On May 13, 2005, appellant's motion was denied. Trial commenced on July 11, 2005, and was completed by July 14, 2005. Appellant offered no testimony at trial. Following his conviction and sentencing by the jury, appellant filed this appeal.

II. SPEEDY TRIAL

Appellant contends he was denied his right to a speedy trial because his jury trial proceeding was scheduled more than nine years after the alleged murder for which he was indicted. He argues that the delay was the fault of the State and that it prejudiced his defense. The State contends that appellant waived his speedy trial right by fleeing to Guatemala, fighting his extradition, and voluntarily resetting his trial twice. Further, the State argues, appellant failed to timely assert his right to a speedy trial, and the delay did not cause him harm.

A. Standard of Review

The United States Constitution and the Texas Constitution both provide that every accused shall have the right to a speedy trial. U. S. Const. amend. VI; Tex. Const. art. I, §10. In determining whether a criminal defendant has been denied his federal or state constitutional right to a speedy trial, a court must use a balancing test in which the conduct of both the State and the defendant are weighed. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Shaw v. State*, 117 S.W.3d 883, 888 (Tex. Crim. App. 2003). The factors to be weighed in the balance include, but are not necessarily limited to: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) the prejudice to the

defendant resulting from the delay. *Barker*, 407 U.S. at 530; *Shaw*, 117 S.W.3d at 888-89. The factors are all related and must be considered together with other relevant circumstances on a case by case basis. *Barker*, 407 U.S. at 533. No single factor is necessary or sufficient to establish a violation of a defendant's right to a speedy trial. *Id.*

In reviewing the trial court's decision on a speedy trial issue, the appellate court applies a bifurcated standard of review, meaning that an abuse of discretion standard applies to the factual components and a de novo standard applies to the legal components. *State v.* Munoz, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999). The appellate court must review the trial court's ruling in light of the arguments, information, and evidence that was available to the trial court at the time it ruled. *Dragoo v. State*, 96 S.W.3d 308, 313 (Tex. Crim. App. 2003). The trial court's ruling must be upheld if it is supported by the record and correct under the applicable law. *Shaw*, 117 S.W.3d at 889.

B. Application of *Barker* Factors

1. Length of Delay

The first factor, the length of the delay, is measured from the time the defendant is arrested or formally accused. *United States v. Marion*, 404 U.S. 307, 313 (1971). The length of the delay is, to some extent, a triggering mechanism, so that a speedy trial claim will not be heard until passage of a period of time that is prima facie unreasonable under the circumstances. *Doggett v. United States*, 505 U.S. 647, 651-52 (1992); *Barker*, 407 U.S. at 530. "If the accused makes this showing, the court must then consider, as one factor among several, the extent to

which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." *Doggett*, 505 U.S. at 652.

In general, delay approaching one year is sufficient to trigger a speedy trial inquiry. *Id.* at 652 fn. 1. Appellant was indicted on June 28, 1995. His trial began on July 11, 2005. The State concedes that a delay of ten years is sufficient to trigger a speedy trial inquiry. Moreover, the delay here stretched significantly beyond the minimum needed to warrant such an inquiry. *See Shaw*, 117 S.W.3d at 889. Consequently, this factor weighs in favor of finding a violation of appellant's right to a speedy trial. *Id.*

2. Reason for Delay

The State bears the initial burden of justifying a lengthy delay. *Emery v. State*, 881 S.W.2d 702, 708 (Tex. Crim. App. 1994). In light of a silent record or one containing reasons insufficient to excuse the delay, it must be presumed that no valid reason for the delay existed. *See Turner v. State*, 545 S.W.2d 133, 137-38 (Tex. Crim. App. 1976). In examining the reasons for the delay, "different weights should be assigned to different reasons." *Munoz*, 991 S.W.2d at 822 (quoting *Barker*, 407 U.S. at 531). A deliberate attempt to delay the trial to hamper the defense should be weighted heavily against the State. *Barker*, 407 U.S. at 531. A more neutral reason, such as negligence or overcrowded courts, should be weighted less heavily. *Id.* Finally, a valid reason justifies appropriate delay. *Id.*

a. June 28, 1995 to March 30, 2001

Appellant first argues that his right to a speedy trial was violated because, beginning in June 1995,

there was a "six-year period of inaction by the District Attorneys and law enforcement agencies." He contends that a lack of effective communication between the Irving Police Department and the Dallas County Sheriff's Office resulted in a complete cessation of action between March 1996 and March 2001. Further, he maintains, that lack of activity led to the failure of the U.S. Embassy in Guatemala to contact law enforcement officials when appellant applied for a visa on February 7, 2001. Appellant argues that the fact that Assistant District Attorney Jeff Shaw was able to extradite appellant from Guatemala after receiving the case in 2001 shows that appellant could have been apprehended and brought to the United States sooner.

The State asserts that the six-year delay between the date of the presentment of the indictment and the discovery of appellant's whereabouts was justified because it was due entirely to appellant evading the law. The State contends that Detective Renfroe searched for appellant at three residences in the Dallas area and posted appellant's warrant on NCIC and TCIC. Renfroe also later contacted the U.S. Embassy and the U.S. State Department to provide them with information regarding appellant's whereabouts. The Dallas Sheriff's Office attempted to serve an arrest warrant on appellant soon after the murder and later ran a search in a nationwide database to gather any new information on appellant. The State argues that because appellant's location between June 1995 and March 2001 was unknown to the State, appellant's evasion was beyond the State's control and should not be weighed against the state.

The record shows that appellant left the United States and traveled to Guatemala after the murder of Velasquez. Although there is no evidence that appellant used an alias or tried to conceal his whereabouts during that time, his location within Guatemala was unknown to the State until his arrest in that country in March 2001. Detective Renfroe and the Dallas Sheriff's Office pursued all leads made known to them from 1995 to 2001, including searching for appellant locally and contacting the U.S. Embassy in Guatemala and the U.S. State Department. *See Lott v. State*, 951 S.W.2d 489, 493-95 (Tex. App.-El Paso 1997, reh'g denied) (finding no evidence of failure to follow reasonable leads where prosecution had no information as to defendant's specific location); *Burgett v. State*, 865 S.W.2d 594, 597 (Tex. App.-Fort Worth 1993, pet. ref'd) (concluding that difficulty in locating appellant did not amount to procrastination where State visited appellant's address, contacted his known associates, subpoenaed his wife's phone records and staked out her place of employment, checked vehicle registration records in all fifty states, and entered appellant's name as a fugitive in state and national databases).

Appellant argues that the Dallas Sheriff's Office "would have taken steps" had they been informed by Detective Renfroe prior to March 2001 that appellant was in Guatemala. The record does not indicate, however, what those steps would have been or how such steps would have led to appellant's apprehension. Appellant further contends that increased contact with the U.S. Embassy in Guatemala might have led to his being located in

February 2001 rather than March 2001. However, a decision not to explore a particular search avenue to the fullest extent possible does not render the overall search unreasonable or negligent. *See Lott*, 951 S.W.2d at 495 (finding that although detection of a mistake in Veterans' Administration records might have led police to defendant more quickly, search was not unreasonable or negligent).

The cases relied on by appellant in support of his argument are distinguishable from this one because in each of those cases there was some evidence that the prosecution knew specifically where the defendant could be located, but failed to check on the defendant's status. *See Doggett*, 505 U.S. at 649-50 (government negligent because it knew fugitive was held in prison in Panama on drug charges, but failed to check status with Panamanian government); *Pierce v. State*, 921 S.W.2d 291, 294 (Tex. App.-Corpus Christi 1996, no pet.) (prosecution negligent because it had correct Houston address for defendant, but made no attempts to locate defendant there); *Branscum v. State*, 750 S.W.2d 892, 893-94 (Tex. App.-Amarillo 1988, no pet.) (prosecution negligent because it knew defendant was in Oklahoma mental hospital and assumed, without checking, that defendant was incompetent to stand trial). In this case, it was not until appellant was arrested and jailed for three murders in Guatemala in March 2001 that U.S. law enforcement officers became aware of appellant's location.

An appellate court will not disturb the trial court's ruling on a motion to dismiss an indictment absent an abuse of discretion. *Lott*, 951 S.W.2d at 494. We conclude that the record in this case

supports a determination that the State used reasonable diligence in its pursuit of appellant and was not negligent in seeking appellant's apprehension between June 28, 2005, and March 30, 2001.

b. March 30, 2001 to July 29, 2004

Appellant asserts that the extradition proceedings initiated by the State could have been handled more expeditiously had the State "been familiar with Interpol procedures and resources." The State argues that the delay between March 30, 2001, the date the State learned of appellant's whereabouts, and July 29, 2004, the date appellant was placed into jail in Dallas, was due entirely to appellant's efforts in fighting his extradition and was not due to any negligence or failure of diligence on the part of the State. Therefore, the State contends, this portion of the delay was justified.

The record shows that extradition proceedings were initiated by the State in April 2001. The State prepared and submitted all required documentation pertaining to the extradition and requested periodic updates on appellant's extradition appeals. Moreover, the State enlisted the assistance of the Office of International Affairs and the U.S. Ambassador to Guatemala in obtaining the necessary signatures on appellant's extradition paperwork.

Appellant did not sign a waiver of extradition. When his extradition was granted by a Guatemalan court, he appealed the court's ruling. When he lost that appeal, he appealed again.

Delay caused by acts of the accused that are beyond the control of the prosecution should not

weigh against the State. *Burgett*, 865 S.W.2d at 597. Because appellant was in large part responsible for the delay from March 30, 2001, to July 29, 2004, that delay was justified and does not weigh against the State.

c. July 29, 2004 to July 11, 2005

Appellant argues that even after he was placed in the Dallas County jail, there was further delay because the State tried a different person on the date originally scheduled for his trial. The State contends that appellant's trial was reset twice by agreement of the parties and without objection. Further, the State asserts, appellant filed his motion to dismiss on March 14, 2005, thereby adding to the delay. Had appellant not agreed to reset his trial date and not filed his motion to dismiss, the State argues, he would have had his trial on December 6, 2004, just over five months after he was placed into the Dallas jail. The State maintains that those five months of delay can be classified as a reasonable period for case preparation and should not weigh against the State.

The record does not contain any evidence that appellant objected to the resetting of his case or that he was not in agreement with the resetting. Accordingly, the trial court reasonably could have concluded that the delay from July 29, 2004 to July 11, 2005, was valid and justified.

3. Assertion of Right

Although a defendant's failure to seek a speedy trial does not amount to a waiver of the speedy trial right, failure to seek a speedy trial makes it difficult for a defendant to prevail on a speedy trial claim. *Barker*, 407 U.S. at 532. A defendant's failure to make a timely demand for a speedy trial indicates

strongly that he did not really want one and that he was not prejudiced by not having one. *Dragoo*, 96 S.W.3d at 314. The longer the delay becomes, the more likely it is that a defendant who really wanted a speedy trial would take some action to obtain one. *Id.* Thus, a defendant's inaction weighs more heavily against a violation the longer the delay becomes. *Id.* Further, when the failure to assert the right is made late and never heard until trial, it weakens all the other *Barker* factors because they are so dependent upon the assertion. *Haney v. State*, 977 S.W.2d 638, 643 (Tex. App.-Fort Worth 1998, pet. ref'd). A defendant's motivation in asking for a dismissal, rather than seeking a trial setting, may sometimes attenuate the strength of his claim. *Phillips v. State*, 650 S.W.2d 396, 401 (Tex. Crim. App. [Panel Op.] 1983). Asking for a dismissal, however, does not necessarily result in waiver of the claim. *State v. Perkins*, 911 S.W.2d 548, 553 (Tex. App.-Fort Worth 1995, no pet.). Defense counsel may legitimately feel that a long delay has caused his client so much prejudice that dismissal is warranted. *Phillips*, 650 S.W.2d at 401. Because a defendant's assertion of the right must be viewed in the light of the defendant's other conduct, each case must turn on its own facts. *Burgett*, 865 S.W.2d at 598.

Appellant contends that there is no evidence he was aware of any arrest warrant having been filed against him prior to June 2001, when he was served with extradition papers. Therefore, he argues, he had no opportunity to assert his right to a speedy trial during that time. The State contends that, even assuming appellant did not know of the pending charge against him until June 2001, he did not assert

his speedy trial right until almost four years later. Furthermore, the State argues, when appellant finally did assert his right, he sought a dismissal of the charge rather than asking for a trial. Accordingly, the State contends, this factor weighs heavily in favor of the State and substantially weakens the other *Barker* factors.

After the State located appellant in Guatemala in March 2001, appellant fought extradition through two appeals over the course of three years. Further, although counsel was appointed for appellant in July 2004, his motion to dismiss for failure to afford a speedy trial was not filed until March 14, 2005, one week after his scheduled trial date. *See Dragoo*, 96 S.W.3d at 314-15 (finding that assertion of speedy trial right on eve of trial weighed strongly against defendant, where he was represented by counsel at all relevant times). We conclude appellant's failure to diligently assert his right to a speedy trial weighs heavily against him.

4. Prejudice Caused by Delay

Prejudice should be assessed in light of the interests a speedy trial is designed to protect: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, and (3) guarding against impairing the accused's defense by loss of exculpatory evidence and dimming memories. *Barker*, 407 U.S. at 532. "Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *Shaw*, 117 S.W.3d at 890 (quoting *Barker*, 407 U.S. at 532). "Furthermore, with respect to the third interest, relating to the defendant's ability to defend himself,

affirmative proof of prejudice is not essential to every speedy trial claim, because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." *Shaw*, 117 S.W.3d at 890 (quoting *Doggett*, 505 U.S. at 655). "On the other hand, this presumption of prejudice to the defendant's ability to defend himself is 'extenuated . . . by the defendant's acquiescence' in the delay." *Shaw*, 117 S.W.3d at 890 (quoting *Doggett*, 505 U.S. at 658).

Appellant acknowledges that testimony of two eyewitnesses is strong enough to effectively foreclose a challenge to the sufficiency of the evidence. However, appellant asserts that there were at least three other persons present in two cars at the scene of the alleged murder. Thus, appellant argues, questions were effectively raised as to the possible motive and circumstances surrounding the killing. In addition, appellant asserts that evidence was apparently removed from one of Velasquez's boots by persons present at the scene, raising questions regarding the possibility of drug trafficking. Had a timely investigation been conducted by the defense, appellant argues, those avenues of inquiry "might well have been established." Appellant contends that when defense counsel was appointed in July 2004, any opportunity for a meaningful investigation was gone.

The State argues that no presumption of prejudice is warranted in this case because appellant was the cause of the trial delay and because the State used diligence in attempting to bring him to trial. In the absence of a presumption of prejudice, the State asserts, appellant has failed to meet his

burden to affirmatively establish that he was harmed from the delay in that his claim of lack of sufficient time for reasonable investigation is vague and unsupported. Even if a presumption of prejudice applies, the State argues, such prejudice is extenuated by appellant's active role in, and acquiescence to, the delay. The State further contends that appellant's claimed presumptive harm of lack of time for meaningful investigation is rebuttable in that five and one-half months is long enough to make a reasonable investigation into the case. Finally, the State asserts that the presumptive harm claimed by appellant is not sufficiently identified, and therefore does not satisfy the *Barker* requirement for harm.

Although appellant argues that it might have been possible to establish alternative motives or circumstances regarding the killing, he does not make any showing that he exercised diligence in attempting to do so. *See Burgett*, 865 S.W.2d at 598 (finding that where appellant made no showing that he exercised due diligence to locate missing witness, he had not shown prejudice resulting from trial delay); *Munoz*, 991 S.W.2d at 829 (determining that bare assertion of dimming memories does not constitute "some showing" of an impairment to the defense). Accordingly, he has not shown that the delay weakened his ability to establish such alternative motives or circumstances. We conclude that because appellant has not shown prejudice caused by the delay, this factor does not weigh in appellant's favor. *See Lott*, 951 S.W.2d at 496 (finding that presumed impairment of defendant's defense did not outweigh the fact that he was largely

responsible for the delay and fought extradition after being located).

III. CONCLUSION

Applying the balancing test of *Barker* and the appropriate standard of review, we conclude that the trial court did not err in denying appellant's motion to dismiss for violation of the right to a speedy trial. The interval between appellant's indictment and his trial was long enough to be presumptively prejudicial. However, the record supports a determination that the State used reasonable diligence in its pursuit of appellant and was not negligent in seeking appellant's apprehension. Moreover, appellant fought extradition from Guatemala and agreed to the resetting of his trial date on two occasions. The record further shows that although appellant was informed of the charges against him in June 2001, his motion to dismiss for failure to afford a speedy trial was not filed until almost four years later. Finally, appellant articulated no prejudice attributable to the delay, and any presumption of prejudice is extenuated by his own responsibility for the delay.

Accordingly, we decide appellant's sole issue against him. The judgment of the trial court is affirmed.

DOUGLAS S. LANG
JUSTICE

APPENDIX I

WRIT NO. W01-01091-R(A)

EX PARTE	§ IN THE 265TH JUDICIAL
	§ DISTRICT COURT
RAFAEL ARRIAZA GONZALES	§ DALLAS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this 11 day of September, 2007, came on to be considered Applicant's Application for Writ of Habeas Corpus. Having considered this pleading, as well as the State's Response, the contents of the trial court's file, and the appellate record, this Court enters the following Findings of Fact and Conclusions of Law:

1. This Court finds that Applicant was convicted of murder on July 14, 2005.
2. This Court finds that Applicant was sentenced to thirty (30) years imprisonment.
3. This Court finds that Applicant appealed his conviction. Applicant's conviction was affirmed on direct appeal. *Gonzales v. State*, 05-05-01140-CR, 2006 Tex. App. LEXIS 5984 (Tex. App.—Dallas July 12, 2006, no pet.) (not designated for publication).
4. This Court finds that Applicant is presently

confined and restrained of his liberty.

5. This Court notes that Applicant has filed a post-conviction writ of habeas corpus under TEX. CODE CRIM. PROC. ANN. art. 11.07 in which he alleges three grounds for relief: (1) a State's witness tampered with evidence, (2) he was deprived effective assistance of counsel at trial and on direct appeal, and (3) there was no evidence, or insufficient evidence, to support his conviction for murder.

Tampering with Evidence

6. Applicant claims that a State's witness, Luz Del Cid, tampered with physical evidence. Applicant also claims that Del Cid made a false report to a peace officer.
7. This Court finds that Applicant offered no habeas proof of these allegations. Rather, Applicant points to discrepancies between Del Cid's testimony and that of another witness, Darlene Nicole Keener.
8. This Court finds that any discrepancies or conflicts between the testimonies of the witnesses at trial was within the province of the jury to resolve. TEX. CODE CRIM. PROC. ANN. art. 38.04; *Johnson v. State*, 23 S.W.3d 1, 9 (Tex. Crim. App. 2000).
9. This Court finds that Applicant's claim is more in the nature of a challenge to the sufficiency of the evidence that a claim that a witness tampered with evidence.
10. This Court concludes that Applicant has not established either that witness Del Cid tampered

with evidence or that she made a false report to a peace officer.

Assistance of Counsel: Trial

11. Applicant claims, in a non-enumerated ground for relief, that he received ineffective assistance of counsel at trial.
12. This Court finds that Applicant's claims are less than specific. However, due to Applicant's repeated references that trial counsel was not familiar with the facts of the case, the Court construed Applicant's claim as one that trial counsel did not fully prepare for trial.
13. This Court notes that Applicant was represented at trial by Daniel Montalvo, a licensed attorney in good standing with the State Bar of Texas.
14. This Court finds that Applicant has wholly failed to provide any habeas support for his allegations.
15. This Court recognizes that a criminal defendant is entitled to effective representation at trial. U.S. CONST. amends VI, XIV; TEX. CONST. Art. I § 10. To establish an ineffective assistance of counsel claim, Applicant must show that: (1) his counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Black v. State*, 816 S.W.2d 350, 356 (Tex. Crim. App. 1991); *Henandez v. State*, 726 S.W.2d 53, 54-55 (Tex. Crim. App. 1986).
16. This Court notes that ineffective assistance of

counsel is judged by an examination of a totality of the circumstances as opposed to isolated failures or omissions. *Bridge v. State*, 726 S.W.2d 558, 571 (Tex. Crim. App. 1986); *Lyon v. State*, 885 S.W.2d. 506, 519 (Tex. App.—El Paso 1994, pet. ref'd.).

17. This Court has reviewed the appellate record and notes the following affirmative actions of trial counsel:

- Trial counsel filed numerous motions with this court. These motions, which also include an "omnibus" pre-trial motion, requested the appointment of an investigator to assist with Applicant's defense, requested notice of extraneous offenses, moved to dismiss for speedy trial violations, and applied for probation, for which Applicant was eligible.
- Trial counsel filed an extensive, written response to a State's motion which related to Applicant's apprehension in Guatemala and trial.
- Trial counsel filed a motion for new trial.
- Trial counsel caused an extensive hearing to be heard on Applicant's motion for speedy trial.
- Trial counsel was an active participant in the voir dire of the jury panel.
- Trial counsel cross-examined all but two of State's witnesses during the State's case-in-chief.
- Trial counsel caused a hearing to be held outside the presence and hearing of the jury to decide the admissibility of impeachment evidence against a key State's witness.

- Trial counsel made appropriate objections throughout the trial and obtained rulings thereon.
- At the close of the State's case-in-chief, trial counsel moved for a directed verdict.
- Trial counsel made closing arguments at guilt/innocence on Applicant's behalf.
- Trial counsel presented evidence at punishment in an effort to mitigate punishment.

18. This Court finds that trial counsel, Mr. Montalvo, was an active advocate who vigorously represented Applicant.
19. This Court concludes that Mr. Montalvo provided Applicant with effective representation.
20. This Court concludes that Mr. Montalvo's representation met the objective standard of reasonableness based on prevailing professional norms.
21. This Court concludes that ineffective assistance of trial counsel has not been established.

Assistance of Counsel: Appellate

22. Applicant claims that he received ineffective assistance of counsel on direct appeal.
23. This Court finds that Applicant's claims are less than specific. However, due to Applicant's repeated references that counsel wanted a "quick disposal" of the appeal, this Court construes Applicant's claim as one that appellate counsel failed to raise points of error on appeal which would have entailed him to relief.
24. This Court notes that Applicant was represented

on direct appeal by Russ Henrichs, a licensed attorney in good standing with the State Bar of Texas.

25. This Court notes that appellate counsel raised one issue on appeal, *i.e.*, that the trial court erred in denying his motion to dismiss for violation of his right to a speedy trial.

26. This Court notes that the speedy trial issue was raised in this Court and was the subject of an extensive pre-trial hearing.

27. This Court notes that the appellate court considered the speedy trial issue on the merits but denied the claim and affirmed the conviction. *Gonzalez*, 2006 Tex. App. LEXIS 5984 *7-25.

28. This Court notes that a defendant has a constitutional right to effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Ex parte Coy*, 909 S.W.2d 927, 928 (Tex. Crim. App. 1995).

29. This Court notes that, in analyzing claims of ineffective assistance of appellate counsel, Texas applies the two prong test of *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). *Ex parte Jarrett*, 891 S.W.2d 935, 938 (Tex. Crim. App. 1994). In order to meet this test, Applicant must establish: 1) that appellate performance was deficient and 2) that, due to counsel's unprofessional errors, there exists a reasonable probability sufficient to undermine confidence in the outcome.

30. This Court notes that appellate counsel need not raise all possible claims of error in order to be effective. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). Nor does the law require that an appellate

attorney advance every conceivable argument on appeal that the trial record supports. *Williams v. State*, 946 S.W.2d 886, 904 (Tex. App.—Waco 1997, no pet.); *Stafford v. State*, 758 S.W.2d 663, 674 (Tex. App.—Houston [1st Dist.] 1988), *rev'd on other grounds*, 813 S.W.2d 813 S.W.2d 503 (Tex. Crim. App. 1991) (citing *Gray v. Greer*, 800 F.2d 644, 647 (7th Cir. 1986).

31. This Court is of the opinion that Applicant was afforded a meaningful appeal.

32. This Court concludes that Applicant has failed to establish ineffective assistance of appellate counsel.

Sufficiency of Evidence

33. Applicant claims that there was no evidence, or insufficient evidence, to support his conviction for murder.

34. This Court notes that a claim of insufficient evidence is not properly raised in a habeas corpus application. *Ex parte McClain*, 869 S.W.2d 349, 351 (Tex. Crim. App. 1994).

35. To the extent that Applicant's claim is one of insufficient evidence, or factually insufficient evidence, this Court is of the opinion that the claim should be dismissed as it is not cognizable under Article 11.07.

36. This Court recognizes that a claim of no evidence is cognizable under Article 11.07. *Ex parte Perales*, 215 S.W.3d 418, 419-420 (Tex. Crim. App. 2007); *Ex parte Moffett*, 542 S.W.2d 184 (Tex. Crim. App. 1976).

37. This Court finds that the record of Applicant's trial is not devoid of evidentiary support for his

conviction. Specifically, this Court finds that the following facts adduced at trial support Applicant's conviction:

- Applicant was charged with the murder of Roberto Velazquez, who had been shot several times from the front seat of a parked car as he stood near that car on June 2, 1995, at approximately 12:30 p.m.
- Luz Del Cid, a sister of Velasquez, testified that she saw Applicant shoot Velasquez several times.
- A second eyewitness, Darlene Nicole Keener, was baby-sitting nearby and looked up when she heard the gunshots. After shooting Velasquez, Applicant drove away.
- Detective Harold Renfroe, a police officer with the City of Irving, showed separate photo lineups to Del Cid and Keener. Both witnesses identified Applicant from the photo lineups.

38. This Court concludes that, when these facts are considered, and viewed in the light most favorable to the verdict, it cannot be held that there is no evidence to support Applicant's conviction.

This Court recommends that all requested relief be denied.

So ordered on this 11 day of September, 2007.

/s/ Mark Stoltz
Mark Stoltz
Judge, 265th Judicial
District Court

APPENDIX J

WRIT NO. W01-01091-R(A)

EX PARTE	§ IN THE 265TH JUDICIAL
	§ DISTRICT COURT
RAFAEL ARRIAZA GONZALES	§ DALLAS COUNTY, TEXAS

ORDER

The clerk is ordered to transmit a copy of the above findings to the Court of Criminal Appeals in Austin, Texas.

The clerk is further ordered to transmit a copy of this order to Applicant, Rafael Arriaza Gonzalez, #1316090, Dick Ware Unit, 1681 South County Rd., 202 Colorado City, Texas 79512, and counsel for the State of Texas, Laura Anne Coats, Dallas County District Attorney's Appellate Section, 133 N. Industrial Blvd., LB19, Dallas, Texas 75207.

So ordered on this 11 day of September, 2007.

/s/ Mark Stoltz
Mark Stoltz
Judge,
265th Judicial District
Court

APPENDIX K

(Order of the Texas Court of Criminal Appeals Denying Petition for Writ of Habeas Corpus)

APPLICANT: RAFAEL ARRIAZA GONZALEZ
APPLICATION NO. WR-67,256-02

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT WITHOUT HEARING.

/s/ Cathy Cochran **11/21/07**
JUDGE **DATE**

APPENDIX L

PETITION FOR WRIT OF HABEAS CORPUS: 28 USC § 2254 (Rev. 10/99)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PETITION FOR A WRIT OF HABEAS CORPUS
BY A
PERSON IN STATE CUSTODY

RAFAEL ARRIAZA GONZALEZ
PETITIONER
(Full name of Petitioner)

Lynaugh Unit
CURRENT PLACE OF CONFINEMENT

vs.

TDCJ # 1316090
PRISONER ID NUMBER

3-08CV0151-D
CASE NUMBER
(Supplied by the Clerk of the District Court)

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice – Institutional Division
(TDCJ)
RESPONDENT
(Name of TDCJ Director,

Warden, Jailor, or
authorized person having
custody of petitioner)

INSTRUCTIONS - READ CAREFULLY

1. The petition must be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. Any false statement of an important fact may lead to prosecution for perjury. Answer all questions in the proper space on the form.
2. Additional pages are not allowed except in answer to questions 11 and 20. Do not cite legal authorities. Any additional arguments or facts you want to present must be in a separate memorandum.
3. When the Clerk of Court receives the $5.00 filing fee, the Clerk will file your petition if it is in proper order.
4. If you do not have the necessary filing fee, you must ask permission to proceed *in forma pauperis*. To proceed *in forma pauperis*, (1) you must sign the declaration provided with this petition to show that you cannot prepay the fees and costs, and (2) if you are confined in TDCJ-ID, you must send in a certified *In Forma Pauperis* Data Sheet from the institution in which you are confined. If you are in an institution other than TDCJ-ID, you must send in a certificate completed by an authorized officer at your institution certifying the amount of money you have on deposit at that institution. If you have

access or have had access to enough funds to pay the filing fee, then you must pay the filing fee.

5. Only judgments entered by one court may be challenged in a single petition. If you want to challenge judgments entered by different courts, either in the same state or in different states, you must file separate petitions as to each court.
6. Include all your grounds for relief and all the facts that support each ground for relief in this petition.
7. When you have finished filling out the petition, mail the original and two copies to the Clerk of the United States District Court for the federal district within which the State court was held which convicted and sentenced you or to the federal district in which you are in custody. A "VENUE LIST," which lists U.S. District Courts in Texas, their divisions, and the addresses for the clerk's office for each division, is posted in your unit law library. You may use this list to decide where to mail your petition.
8. Petitions that do not meet these instructions may be returned to you.

PETITION

What are you challenging? (Check only one)

XXX A judgment of conviction or sentence, probation or deferred-adjudication probation. (Answer Questions 1-4, 5-12 & 20-23)

☐ A parole revocation proceeding. (Answer Questions 1-4, 13-14, & 20-23)

☐ A disciplinary proceeding. (Answer Questions 1-4, 15-19 & 20-23)

All petitioners must answer questions 1-4:

1. Name and location of the court (district and county) which entered the conviction and sentence that you are presently serving or that is under attack: 265th Judicial District Dallas County, TX, 133 N. Industrial Blvd Dallas TX 75207
2. Date of judgment of conviction: July 14, 2005
3. Length of sentence: 30 years TDCJ
4. Nature of offense and docket number (if known): Murder § 19.02 F01-01091-TR

Judgment of Conviction or Sentence, Probation or Deferred-Adjudication Probation:

5. What was your plea? (Check one)
   XX Not Guilty ◻ Guilty ◻ Nolo contendere
6. Kind of trial: (Check one)
   XXX Jury ◻ Judge Only
7. Did you testify at the trial? ◻ Yes XXXX No
8. Did you appeal the judgment of conviction?
   XXXX Yes ◻ No
9. If you did appeal, in what appellate court did you file your direct appeal? DALLAS FIFTH COURT OF APPEALS Cause Number (if known) 05-05-01140-CR

   What was the result of your direct appeal (affirmed, modified or reversed): AFFIRMED

   What was the date of that decision? July 12, 2006/ Mandate issued 9-26-06

   If you filed a petition for discretionary review after the decision of the court of appels, answer the following:

Result: N/A

Date of result: N/A

Cause Number (if known): N/A

If you filed a petition for *writ of certiorari* with the United States Supreme Court, answer the following:

Result: N/A

Date of Result: N/A

10. Other than a direct appeal, have you filed any petitions, applications or motions from this judgment in any court, state or federal? This includes any state applications for writ of habeas corpus that you may have filed.

XXX Yes ☐ No

11. If your answer to 10 is "Yes," give the following information:

Name of court: 265th Judicial District Dallas County, Texas

Name of proceeding: State Writ of Habeas Corpus application Art. §11.07

Cause number (if known): WRIT NO. W01-01091-R(A)

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court.

Initial writ 2/2/07 returned court stamped filed 3/08/07. & court stamped filed 7/31/07

Grounds Raised: 1. The state's witness tampered with evidence; 2. deprivation of effective assistance at trial on direct appeal; and 3. there was no evidence to support conviction

NOTE: speedy trial violation on initial brief

(answered by state) .....

Date of final decision: November 21, 2007

Name of court that issued the final decision: Court of Criminal Appeals (white card) denied without written order

As to any ***second*** petition, application or motion, give the same information:

Name of court: n/a

Name of proceeding: n/a

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court. n/a

Grounds Raised: n/a

Date of final decision: n/a

Name of court that issued the final decision: n/a

If you have filed more than two petitions, applications, or motions, please attach an additional sheet of paper and give the same information about each petition, application, or motion.

12. Do you have any future sentence to serve after you finish serving the sentence you are attacking in this petition? ☐ Yes **XXXXXX** No

(a) If your answer is "yes," give the name and location of the court that imposed the sentence to be served in the future: n/a

(b) Give the date and length of the sentence to be served in the future: n/a

(c) Have you filed, or do you intend to file, any petition attacking the judgment for the sentence you must serve in the future? ☐ Yes **XXXXXX** No NOT APPLICABLE

Parole Revocation:

13. Date and location of your parole revocation: n/a

14. Have you filed any petitions, applications, or motions in any state or federal court challenging your parole revocation?

    ☐ Yes XXX No NOT APPLICABLE

    If your answer is "yes," complete Question 11 above regarding your parole revocation.

Disciplinary Proceedings:

15. For your original conviction, was there a finding that you used or exhibited a deadly weapon?

    ☐ Yes XXX No NOT APPLICABLE

16. Are you eligible for mandatory supervised release?

    ☐ Yes XXX No

17. Name and location of prison or TDCJ Unit that found you guilty of the disciplinary violation: n/a

    Disciplinary case number: n/a

18. Date you were found guilty of the disciplinary violation: n/a

    Did you lose previously earned good-time credits?

    ☐ Yes XXX No n/a

    Identify all punishment imposed, including the length of any punishment if applicable, any changes in custody status, and the number of earned good-time credits lost: n/a

19. Did you appeal the finding of guilty through the prison or TDCJ grievance procedure?

    ☐ Yes XXXXX No

    If your answer to Question 19 is "yes," answer the following:

    Step 1 Result: n/a

Date of Result: n/a

Step 2 Result: n/a

Date of Result: n/a

All applicants must answer the remaining questions:

20. State clearly every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.

CAUTION:

Exhaustion of State Remedies: You must ordinarily present your argument to the highest state court as to each ground before you can proceed in federal court.

Subsequent Petitions: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

Following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement is a separate ground for possible relief. You may raise any grounds, even if not listed below, if you have exhausted your state court remedies. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your belief that you are being held unlawfully.

DO NOT JUST CHECK ONE OR MORE OF THE LISTED GROUNDS. Instead, you must also STATE the SUPPORTING FACTS for ANY ground you rely upon as the basis for your petition.

(a) Conviction obtained by plea of guilty which was unlawfully induced, or not made voluntarily, or

made without an understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by the use of a coerced confession.

(c) Conviction obtained by the use of evidence gained from an unconstitutional search and seizure.

(d) Conviction obtained by the use of evidence obtained from an unlawful arrest.

(e) **XXX** Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the prosecution's failure to tell the defendant about evidence favorable to the defendant.

(g) Conviction obtained by the action of a grand or petit jury which was unconstitutionally selected and impaneled.

(h) **XXX** Conviction obtained by a violation of protection against double jeopardy.

(i) Denial of effective assistance of counsel.

(j) Denial of the right to appeal.

(k) Violation of my right to due process in a disciplinary action taken by prison officials.

And some additional grounds.....

enclosed find petitioner's PRO-SE REQUEST FOR COURT ORDER FOR THE STATE TO PRODUCE TRIAL CLERK RECORD & REPORTER'S RECORD AND EVIDENTIARY HEARING

A. **GROUND ONE:** <u>SPEEDY TRIAL VIOLATION:</u> <u>The trial court erred and violated this petitioner's right to a sppedy trial and counsel provided ineffective assistance, in taking 10 years to try the case and counsel permitted petitioner to be re-</u>

indicted.

Supporting FACTS (tell your story briefly without citing cases or law):

This accusation on petitioner occured June 12, 1995, as the initia. indictment alleges. The Dallas D.A. & police department search for petitioner on this alleged acucsation. Petitioner voluntarily filed for an american visa and was held in his country of Guatemala on a murder charge and police INTERPOL warrant. Petitioner fought exrtadition based on his innocence & unaware event. Finally he was brougth to trial March 25, 2005, 2 ½ months short of 10 years. This clear violation of speedy trial rights, and because he was re-indicted with his counsel's permission, he also claims gross ineffective assistance of consel.

B. **GROUND TWO:** TAINTED EVIDENCE AND FAULTY WITNESS RECOLLECTIONS. A VIOLATIONS OF CONSTITUTIONAL DUE PROCESS

Supporting FACTS (tell your story briefly without citing cases or law):

There were 3 witness at the incident this petitioner is accused of. 1. Luz Del Cid sister of the deceased who tampered with some items the deceased had in his boots while dying on the floor.. 2. Scott Hughes who heard the shots & ran out of his apartment and saw Luz Del Cid taking out of the decease's boots what appeared to be drugs, money & a gun. 3. Darlene Nicole Keener (who was 14) who at the time (1995) was baby-sitting in the park close by looked up when she

heard some shots. Additionally there were 3 other persons at the scene, a Rigoberto Ramirez, Albino Chivererra and a Martin Cordoba. There are too many inconsistnecies that the trial transcripts are necessary to sustain this petitioner's constitutional violations.

C. **GROUND THREE: THE STATE IS VIOLATING PETITIONER'S CONSTITUTIONAL RIGHTS BY DENYING HIM COPIES OF THE. CLERK RECORD & REPORTER'S RECORD IN VIOLATION OF U.S. CONSTITUTIONAL RIGHT TO DUE PROCESS, REDRESS, AND ACCESS TO THE COURTS.**

Supporting FACTS (tell your story briefly without citing cases or law):

Petitioner has due diligently filed several pro-se petitions, pleading & motions for copies of his state clerk court: record & reporter's records for him to factually, evidentiary and accurately construe a pro-se brief in support of this § 2254 application (see exhibits: anclosed).

D. **GROUND FOUR: THE TRIAL, APPELLATE, & COA COURT'S CLEARLY ARE violating the petiitoner's STATE CONSTITUTIONAL & U.S. CONSTITUTIONAL, 5TH AMENDMENT TO REMAIN SILENT, CITING HIS SILENCE TO THE CHARGE**

Supporting FACTS (tell your story briefly without citing cases or law):

Clearly the record (appeal brief & COA memorandum opinion) infer that these courts considered his silence as guilty conduct thus violating his 5th amend. constitutional rights to remain silent from his accusers. This man a

native of the country of Guatemala, no English speking-write, does not understand the laws, and upon advice from defense counsel kept silent because as counsel said, "the prosecutor will tear you apart.:!!!

21. Have you previously filed a federal habeas petition attacking the same conviction, parole revocation, or disciplinary proceeding that you are attacking in this petition?

□ Yes **XXXXXX** No

If your answer is "yes," give the date on which each petition was filed, the federal court in which it was filed, and whether the petition was (a) dismissed without prejudice or (b) denied.

n/a

22. Are any of the grounds listed in paragraph 20 above presented for the first time in this petition?

XXXXXXXX Yes □ No

If your answer is "yes," state briefly what grounds are presented for the first time and give your reasons for not presenting them to any other court, either state or federal.

The right to remain silent a 5th Amendment right. Had to bring this up for the first itme after reading the Court of Appeals memorandum opinion brief where they infer about his (petitioner's) silence shows guiltiness. Additionally the discussion about where the state is adamantly saying this petitioner was fighting extradition. Under the law his country's embassy was protecting his rights not to be extradited for the possibility of U.S. execution for this alleged murder offense.

23. Do you have any habeas corpus proceedings or appeals now pending in any court, either state or federal, relating to the judgment or proceeding under attack?

□ Yes **X** No

If "yes," identify each type of proceeding that is pending (i.e., direct appeal, art 11.07 application, or federal habeas petition), the court in which each proceeding is pending, and the date each proceeding was filed.

n/a

Wherefore, petitioner prays that the Court grant him the relief to which he may be entitled.

PRO SE

Signature

of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, day, year).

Executed on _____ (date)

_____

Signature of Petitioner

(required)

Petitioner's current address: James Lynaugh Unit 1098 S. Hwy 2037 Fort Stockton, Texas 79735

APPENDIX L-1

REQUEST EVIDENTIARY HEARING & COURT ORDER FOR STATE TRIAL RECORD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RAFAEL ARRIAZA GONZALEZ
Petitioner,

v.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice – Institutional Division (TDCJ)
Respondent.

CIVIL ACTION NO._____

PETITIONER'S MEMORANDUM IN SUPPORT OF § 2254

TO THE HONORABLE JUDGE FO SAID COURT:

NOW COMES, RAFAEL ARRIAZA GONZALEZ, petitioner pro-se with his memorandum in support and states:

JURISDICTION

This court has jurisdiction I subject matter and parties pursuant to 28 U.S.C. §§2241 & 2254. Rafael Arriaza Gonzalez ("Petitioner") was convicted in the 265th Judicial District Dallas County, Texas (F01-01091-TR) on July 12, 2005.

GROUNDS FOR RELIEF

1. SPEEDY TRIAL VIOLATION. The trial court erred & violated State Court of Appeals, federal Court of appeals rulings, U.S. Constitutional right of spedy trial 10 yrs later.
2. WITNESS TAMPERING (TAINTED EVIDENCE) WITH EVIDENCE & FAULTY RECOLLECTIONS.
3. THE STATE IS VIOLATING PETITIONER'S CONSTITUTIONAL RIGHT TO HAVE ACCESS TO THE COURTS BY DENYING HIM COPIES OF CLERK RECORD & REPORTER'S RECORD TO SUBSTANTIATE HIS CLAIMS.
4. TRIAL, APPELLATE & COA STATE COURTS CLEARLY ARE VIOLATING THE PETITIONER'SSTATE CONSTITUTIONAL & U.S. CONSTITUTIONAL 5TH AMENDMENT RIGHT TO REMAIN SILENT,. CITING THE COURTS ARE INFERING HIS SILENCE AS GUILT TO THE CHARGE.

STANDARD REVIEW

This petition is subjected to review under the amendments to the federal habeas corpus statutes embodied in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996. Under the AEDPA, a state prisoner may not obtain relief

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

see 28 U.S.C. § 2254(d) (2006).

A decision is contrary to, or an unreasonable application, of, clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] court on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 413 (2000), quoted in Hill v. Johnson, 210 F.3d 481. 485 (5th Cir. 2000).

Absent a direct conflict with Supreme Court authority, habeas relief is available only if the state-court decision is factually or legally unreasonable. Montoya v. Johnson, 226 F.3d 399, 404 (5th Cir. 2000). However, an unreasonable application of federal law is not the equivalent of an incorrect application. A federal writ may not issue simply because the state court incorrectly applied federal law; the application must also be unreasonable. an "unreasonable application" occurs "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the rpiosner's case. Moreover, the focus is only on the "ultimate legal conclusion that the state court reached and not whether the state court considered and discussed every angle of the evidence. Neal v. Puckett, 286 F.3d 230, 246 (5th Cir. 2002) (en banc); Santellan v. Cockrell, 271 F.3d 190, 193 (5th Cir. 2001) (Holding it is the state court's "ultimate decision" that is to be

tested for unreasonableness, "not very jot of its reasoning.").

Finally, a state court's determination of a factual issue is afforded a presumption of correctness, and the petitioner "shall have the burden of rebutting the presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); Jackson v. Johnson, 150 F.3d 520, 524 (5th Cir. 1998).

REASONABLENESS

This petitioner is being assisted due to his lack of english language knowledge and under perjruy contradicts most of the assumptions and infer by the trial court, appellate court & COA memorandum opinion of affirmation of his case. Additionally, his state writ application (Art. 11.07) was not properly prepared there by losing a vital opportunity to prove his innocence, show ineffective assistance of counsel at trial & appeal. By the help of this honest inmate he reguests from this federal court to grant him his enclosed pro-se motion for clerk record & reporter record. It would be unreasonable for the court to deny the record.

REQUEST COURT ORDER FOR THE STATE TO PRODUCE COPIES OF PETITIONER'S TRIAL CLERK RECORD & REPORTER'S RECORD

Petitioner is a national of Guatemala and does not speak or write the English language or complicated legalese. He has relied on trial, appellate and prison writ writer's counsel and feels his message has not been communicated to the courts.

Petitioner has due diligently tried with rpo-se peladings to the courts, for copies of trial clerk record & reporter's record for him to personally & legally

reseacrh and accurately cosntrue a pro-se federal habeas corpus § 2254 requcst because he feels this is the last chance at justice in federal court.

He comes pro-se and is being assisted by a friend in prison with typing, grammar and translation of the law. Haines v. Kerner, 404 U.S. 519-20, 92 SCt. 595-95, 30 LEd2d 652 (1972); "pro-se complaints are held to less stringent standard than pleadigns by attorneys."

In Watkins v. State, 226 SW3d 737 (Tex.App. Waco 2007); the inmate was entitled to free copies of the record (emphasis added).

EXHAUSTION OF STATE COURT REMEDIES

Petitioner pled not guilty to the offense of murder in the 265th Judicial district Dallas county, Texas (F01-01091-TR). Trial commenced July 11, 2005, completed July 14, 2005, found guilty by the jury and sentenced to 30 years. Filed notice of appeal 7-15-05 (05-05-01140-CR) and affirmed July 12, 2006, mandate was issued September 26, 2006.

Petitioner filed his writ application 11.07 3-08-07, was returned not compliant rule 73 TRAP. Re-filed July 2, 2007, stamp by court 7-31-07. Findings of Fact & conclusions of Law considered 9-1—07, denied without written order 11-21-07. WR-67,256-01.

TIMELY FILED § 2254

Calculation:

Trial commenced	7-11-05
guilty by jury	7-14-05
appeal notice	7-15-05
appeal affirmed	7-12-06
mandate issued	9-26-06

state writ filed	2-8-07	4 months 12 days
and retuned none compliance	4-11-07	
correctly filed	7-2-07	2 months 22 days
state reply	9-11-07	
denied with written order	11-21-07	

Total 7 months 3 days
5 months 27 days
remaining

ISSUE ON THE STATE HABEAS PETITION

1. speedy trial violation;
2. state witness tampered with evidence 7 faulty recolelctions;
3. state is denying access to the courts to petiitoner;
4. the state trial, appellate & COA. courts are violating the petitioner's 5th amendment right to remain silent at trial, for infering his guilt by remaning silent.

CASE BACKGROUND

On June 2, 1995, Roberto Velasquez, was gunned down near an apartment complez in Irving, Texas. Ms. Luz Del Cid, sister of Velasquez, testified that her brother was shot by petitioner who was seated in the front seat of a car, and two other men were there, Rigoberto & Albino. An eyewitness, Darlene Keener (14 yrs. of age) was baby-sitting nearby and looked up when she heard gun shots. Appellant drove away and Rigoberto & Albino also drove away. A witness, Scott Hughes, lived in apartment #1202, was watching TV and heard some shots and looked out his window, went outside and saw a man had several gun shots, grabbed some towels and waited for

paramedics. He also testified he also saw a woman, Ms. Del Cid, approached the injured and pulled out his boots what looked like drugs, money, a gun, and believed it probably was a drug deal gone bad.

STATE RECORDS REQUESTED

This petitioner has diligently and passionately requested from the trial court clerk, district clerk, appeals court for the district and even the district atotrney's office, for a copy of the clerk's record, reporter's record with exhibits, and has been DENIED at all levels.

IT IS VITAL for this petitioner to have the records requested copies to construe a factual and accurate pro-se brief in support of this federal § 2254 habeas relief request.

Petitioner moves this court for a court ORDER for the state to produce requested records, and CONTINUANCE with extension of time while awaiting for the state to comply.

ACTUAL INNOCENCE CLAIM

Claims of actual innocence are categorized either as a Herrera-type or Schlup-type claims, Herrera v. Collins 506 U.S. 390, 113 SCt. 853, 122 LEd2d 203 (1993); Schlup v. Delo 513 U.S. 298, 115 SCt. 851, 130 LEd2d 808 (1995).

A Herrera-type claims involve a substantive claim in which applicant asserts his bare claim of innocence solely on newly discovered evidence. A Schlup-type claim on the other hand is procedural claim in which applicant's claim of innocence does not provide a basis for relief, but is tied to a showing of constitutional error at trial. To establish ineffective assistance, applicant must state specifically what an investigation would have

revealed, what specific evidence would alter the outcome of the trial, Rose v. Johnson 141 F. Supp2d 661, 691 (S.D. Tex. 2001).

RELIEF SOUGHT

WHEREFORE, petitioner prays this court grants the following:

1. A court order for the state trial court to produce copies of the trial clerk court record & reporter's with all relevant exhibits & discovery;
2. An extension of time to accurately construe with the, records of the trial court, an application for § 2254.

IT IS SO PRAYED

Submitted pro-se

/s/ Rafael Arriaza Gonzalez
Rafael Arriaza Gonzalez

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Rafael Arriaza Gonzalez	)	
TDCJ # 1316090	)	
Petitioner,	)	
	)	
v.	)	
	)	
NATHANIEL	)	
QUARTERMAN,	)	Civil Action #
Director,	)	3:08-cv-01510-D
Texas Department of	)	
Criminal Justice,	)	
Correctinal Institutions	)	
Division ("TDCJ")	)	

TIMELY NOTICE OF APPEAL WITH PRO-SE PETITION FOR CERTIFICATE OF APPEALABILITY

To the Honorable Judge of Said Court:

COMES NOW Rafael Arriaza Gonzalez, petitioner pro-se with the above and in support states:

1. On 1/24/08 this petitioner filed his § 2254

petition for federal writ of habeas corpus under 28 U.S.C. § 2254;

2. On 8/25/08 this magistrate judge's findings, conclusions, and recommendations was upheld and dismissed with prejudice as time-barred petition;
3. This petitioner now files his timely notice of appeal and seeks a briefing schedule with local rules and procedures, in support states the following authority:

I.

GROUNDS REQUIRED FOR THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY

Obtaining a certificate of appealability requires a substantial showing of constitutional error. 28 U.S.C. § 2253(i)(2): Drinkard v. Johnson 97 F.3d 751, 756 (5th Cir. 1996). This entails that the question(s) at issue be (a) debatable among reasoning jurists, (b) of a type which could be resolved in the petitioner's favor, or(c) " to deserve encouragement of further proceedings." Lozada v. Deeds, 498 U.S. 430, 432, 111 SCt. 860, 862, 112 LEd2d 956(1991)

II.

QUESTIONS AT ISSUE

1. DID THE STATE DISTRICT COURT & FEDERAL DISTRICT COURT ERRONEOUSLY TIME BARRED PETITIONER 28 U.S.C. 2254 BECAUSE TEXAS PROCEDURE COMMENCES 1 YEAR

LIMITATION FOR FEDERAL WRIT OF HABEAS CORPUS 30 DAYS AFTER TEXAS COURT OF APPEALS AFFIRMS PETITIONER'S APPEAL?

2. PETITIONER COULD NOT HAVE FILED STATE WRIT OF HABEAS CORPUS WITHOUT THE TEXAS COURT OF CRIMINAL APPEALS RULINGS AND THEN, ONLY AFTER, IT ISSUES A MANDATE, COULD PETITIONER FILE HIS ART. 11.07 FOR STATE WRIT OF HABEAS CORPUS. AFTER MANDATE IS ISSUED PETITIONER CAN FILE AND TOLL THE 1 YEAR STATUTE OF LIMITATIONS TO FILE A FEDERAL HABEAS CORPUS §2254. ONLY AFTER MANDATE!
3. THE TEXAS DISTRICT COURT ARE DENYING THE PETITIONER ACCESS TO THE COURTS BY DENYING HIM COPIES OF HIS TRIAL COURT RECORD (I.E., CLERK COURT RECORD & REPORTER RECORD) EVEN AFTER THE PETITIONER FILED THE REQUESTED AND THE DISTRICT COURT DOES NOT RESPOND GRANTED DENIED, REDUCED COST OR TEMPORARY USE. CLERK OR COURT DON'T REPLY?
4. TEXAS STATE DISTRICT COURTS ARE VIOLATING CONSTITUTIONAL STATE AND FEDERAL AMENDMENTS TO FREEDOM OF SPEECH, DUE PROCESS, EQUAL PROTECTION, FAIR PROCESS/REDRESS TO GRIEVANCES AND BY DENYING PRO-SE PRISONERS ACCESS

TO THE COURT RECORD WITH A FAIR JUST HEARING, COST OR TEMPORARY USE. FOR THE COURT RECORD IS VITAL TO ASSIST THE PRISONER TO ACCURATELY/FACTUALLY CONSTRUE HIS PRO-SE BRIEF WHERE PETITIONER IS FROM ANOTHER COUNTRY WITH LIMITED LANGUAGE (ENGLISH) SKILLS, RELYING IN TRANSLATION, RESEARCH & PREPARATION OF PRO-SE BRIEF.

WHEREFORE, Petitioner Rafael Arriaza Gonzalez, PRAYS this court GRANTS relief Sought for justice to be served.

Respectfully Submitted,
/s/ Rafael Arriaza Gonzalez
Rafael Arriaza Gonzalez
TDCJ# 1316090
Petitioner pro se

INMATE DECLARATION

I declare under the penalty of perjury that the enclosed NOTICE OF APPEAL W/PRO-SE PETITION FOR CERTIFICATE OF APPEALABILITY" is true and correct to the best of my knowledge.(pursuant to 28 U.S.C. §1746)
SIGNED on this August 30 2008.

/s/ Rafael Arriaza Gonzalez
Rafael Arriaza Gonzalez

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RAFAEL ARRIAZA GONZALEZ,	)	
aka Rafael Arriaza Gonzales,	)	
#1316090,	)	
Petitioner,	)	
	)	
v.	)	3:08-CV-0151-D
	)	
NATHANIEL QUARTERMAN,	)	
Texas Department of Criminal	)	
Justice, Correctional Institutions	)	
Div.,	)	
Respondent.	)	

RECOMMENDATION REGARDING
CERTIFICATE OF APPEALABILITY

A Notice of Appeal has been field in the above captioned action in which:

(X) the District Court has entered a final order in a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254.

( ) the District Court has entered a final order in a proceeding pursuant to 28 U.S.C. § 2255.

Pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), the undersigned Magistrate Judge recommends as follows:

IFP STATUS:

( ) the party appealing has paid the appellate filing fee.

(X) the party appealing should be GRANTED leave to proceed *in forma pauperis*.

( ) the party appealing is proceeding *in forma pauperis*.

( ) the party appealing should be DENIED leave to proceed *in forma pauperis* for the following reason(s):

- ( ) the Court recommends that the District Court certify, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915(a)(3), that the appeal is not taken in good faith;
- ( ) the person appealing is not a pauper;
- ( ) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and/or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order entered on _____).

COA:

( ) a Certificate of Appealabilty should be

GRANTED. (See issues set forth below).

(X) a Certificate of Appealability should be DENIED. (See reasons stated below).

REASON FOR DENIAL: For the reasons stated in the Findings and Recommendations of the United States Magistrate Judge, filed on July 18, 2008, which were accepted by the District Court on August 20, 2008, Petitioner has failed to demonstrate that reasonable jurists would find it debatable whether the district court was correct in finding that the habeas corpus petition is barred by the statute of limitations. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000).

SIGNED this 10th day of October, 2008.

/s/ Wm. F. Sanderson, Jr.
WM. F. SANDERSON, JR.
UNITED STATES
MAGISTRATE JUDGE

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RAFAEL ARRIAZA GONZALEZ, aka Rafael Arriaza Gonzales, #1316090, Petitioner	)	
v.	)	3:08-CV-0151-D
NATHANIEL QUARTERMAN, Texas Department of Criminal Justice, Correctional Institutions Div., Respondent.	)	

ORDER OF THE COURT ON THE FOREGOING RECOMMENDATION

Considering the record in this case and the above recommendation, and pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), the Court hereby finds and orders:

IFP STATUS:

(X) the party appealing is GRANTED *in forma pauperis* status on appeal.

( ) the party appealing is proceeding *in*

forma pauperis.

( ) the party appealing is DENIED *in forma pauperis* status on appeal for the following reasons:

( ) the Court certifies, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915(a)(3), that the appeal is not taken in good faith. In support of this finding, the Court adopts and incorporates by reference the Magistrate Judge's Findings and Recommendations entered in this case on _____. Based upon the Magistrate Judge's findings, this Court finds that the appeal presents no legal points of arguable merit and is therefore frivolous. *See Harkins v. Roberts*, 935 F. Supp. 871, 873 (S.D. Miss. 1996) (citing *Howard v. King*, 707 F. 2d 215, 219-20 (5th Cir. 1983)).

( ) the person appealing is not a pauper;

( ) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and/or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order entered on _____).

COA:

( ) a Certificate of Appealability is GRANTED on the following issues:

_____

(X) a Certificate of Appealability is DENIED. The Court hereby adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation filed in this case on July 18, 2008, which were accepted by the District Court on August 20, 2008, in support of its finding that Petitioner has failed to demonstrate that reasonable jurists would find it debatable whether the district court was correct in finding that the habeas corpus petition is barred by the statute of limitations. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000).

SIGNED THIS 14th day of October, 2008.

/s/Sidney A. Fitzwater
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX P

IN THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

RAFAEL ARRIAZA GONZALEZ,	)	
Aka Rafael Arriaza Gonzales,	)	
#1316090,	)	
Petitioner	)	
	)	
v.	)	3:08-CV-0151-D
	)	
NATHANIEL QUARTERMAND,	)	
Director, Texas Department	)	
of Criminal Justice, Correctional	)	
Institutions Division ("TDCJ"),	)	
Respondent.	)	

PRO-SE NOTICE OF APPEAL (FRAP RULE 4) & REQUEST FOR RECORD ON APPEAL (FRAP RULE 10)

COMES NOW, Rafael Arriaza Gonzalez, petitioner pro-se and in support of his notice of appeal, states:

1. On 10/29/08 petitioner receives notice from the U.S. District Court the court's denial of Certificate of Appealability (COA) signed-dated 10/14/08;
2. This petitioner is a native of the country of

Guatemala and is being assisted by another inmate with the english & legalese tranlsation, typing and legal research of his case;

3. Petitioner seeks this court of appeals for the 5th circuit the briefing schedule to prepare his legal discussion & present the court reasonable jurist would find it debatle whether the district court was correct in finding that the habeas corpus petition is barred by the statute of limitations under the AEDPA: and
4. THIS PETITIONER WILL PRESENT THE COURT THAT THE TEXAS COURT'S MANDATE HAD NOT BEEN ISSUED TILL 9/26/06 THUS, PETITIONER COULD NOT HAVE FILED HIS STATE WRIT OF HABEAS CORPUS, PURSUANT TO RECENT U.S. SUPREME COURT DECISIONS in **Lawrence v. Florida** 549 U.S. ___ (2007) No. 05-8820, and **Carey v. Saffold** 536 U.S. 214, 220 SCt. 2134 153 LEd2d 260 (2000); postconviction tolling.

WHEREFORE, PREMISES CONSIDERED, Petitioner, respectfully prays this Honorable Court of Appeals grants appeal with briefing schedule.

IT IS SO PRAYED.

Petitioner pro-se,

Date: 11-03-08

/s/ Rafael Arriaza Gonzalez
Rafael Arriaza Gonzalez
TDCJ#1316090

APPENDIX Q

No. 08-10871
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATHANIEL QUARTERMAN
Appellee,

v.

RAFAEL ARRIAZA GONZALEZ
Appellant-petitioner

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:08-CV-151

PRO-SE PETITION FOR A CERTIFICATE OF APPEALABILITY

BRIEF FOR APPELLANT

Petitioner pro-se,
RAFAEL ARRIAZA
GONZALEZ
TDCJ#1316090
Lynaugh Unit
1098 S. Hwy 2037
Fort Stockton, Texas 79735
Prison phone# (432)395-2938

CERTIFICATE OF INTERESTED PERSONS

UNITED STATES OF AMERICA,
Appellee,

v. Appeal No. 07-10871

Rafael Arriaza Gonzalez
Appellant-petitioner

The undersigned appellant-petitioner of record certifies that the following persons have an interest in the outcome of this case.

1. U.S. Court of Appeals for the Fifth Circuit
   Office of the Clerk
   F. Edward Herbert Bldg.
   600 S. Maestri Place
   New Orleans, LA 70130
2. United States District Court
   for the Northern District of Texas
   U.S. District Judge Hon: Sidney A. Fitzwater
   Office of the Clerk
   1100 Commerce Rm 1452
   Dallas, Texas 75242-1495
3. Attorney General of Texas Greg Abbott
   (TDCJ Director Nathaniel Quarterman)
   Post Office Box 12548
   Austin, Texas 78711-3548

Petitioner pro-se,
RAFAEL ARRIAZA GONZALEZ
TDCJ # 1316090
Lynaugh Unit
1098 S. Hwy 2037
Fort Stockton, Tx 79735

REQUEST FOR ORAL ARGUMENT

The appellant-petitioner, Mr. Rafael Arriaza Gonzalez, does not request oral argument, unless the appellee request for oral argument, then this appellant-petitioner will seek oral argument before this Honorable Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PEROSNS.....i
REQUEST FOR ORAL ARGUMENT.....ii
TABLE OF CONTENTS.....iii
TABLE OF CITATIONS.....iv
STATEMENT OF JURISDICTION.....1
STATEMENT OF THE ISSUE.....2
STATEMENT OF THE CASE.....3
A. Proceedings below.....3
B. Statement of the Facts.....4
SUMMARY OF THE ARGUMENT.....5
ARGUMENT.....6
ISSUE ONE RESTATED.....7
CONCLUSION.....8
CERTIFICATE OF SERVICE.....9

TABLE OF CITATIONS

Page

CASES:

Ex parte Brown,
662 S.W.2d 3 (Tex.Crim.App. 1983) .....

Ex parte Johnson,
12 S.W.3d 472, 472 (Tex. Crim. App. 2000) .....

Lawrence v. Florida 549 U.S. ___ (2007).....

Carey v. Saffold,
536 U.S. 214, 220 (2002).....

Watkins v. State,
226 S.W.3d 737(Tex.app.-Waco 2007).....

Haines v. Kerner, 404 U.S. 519-20, 92 S.Ct. 594-95,
30 L.Ed.2d 652 (1972).....

Spotville v. Cain,
149 F.3d 374, 377 (5th Cir. 1998).....

CONSTITUTIONAL PROVISIONS/AMENDMENTS

1-14 United States Constitutional Amendments.....

1-10 U.S. Bill of Rights.....

STATUTES

28 U.S.C. §2254.....

28 U.S.C. §2244.....

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")

MISCELLANEOUS

Exhibits A,B,C, and D.....

I.

SHOWING REQUIRED FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY

A certificate of appealability ("COA") from a habeas proceeding will not issue unless the applicant makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issue(s) presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000)(internal quotations and citations omitted). Stated differently, the applicant must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim(s) debatable or wrong." Id; Beazley v. Johnson, 242 F3d 248, 263 (5th Cir. 2001). On the other hand, when the denial of relief is based on procedural grounds (as one of the issues herein), the applicant must not only show that "jurists of reason I find it debatable whether the petition state a valid claim of the denial constitutioanl right" but alos that they would "find it debatable whether the district court was correct in the procedural rulign"Beazley, 242 F3d at 263 (quiting Slack, 529 U.S. At 484); See Hernandez v. Johnson, 213 F3d 243, 248 (5th Cir. 2000). A district court may deny a COA, sua sponte, without requiring further briefing or argument. Alexander v. Johnson, 211 F3d 895 898 (5th Cir 2000) which is what occurred in the instant case.

Applicant requests that this Honorable Court review the pleadings within the record in regards to

whether applicant this

Best Copy Available

STATEMENT OF JURISDICTION

Jurisdiction of this Court (5th Circuit) is invoked under § 2253 of title 28 U.S.C., for a certificate of appealability from a final judgemnt and conviction from a state sentence, and the U.S. District court's denial of an application for a federal writ of habeas corpus under 28 U.S.C. § 2254 application.

A TIMELY NOTICE OF APPEAL WAS filed 8/30/08 in accordance with rule 4(b) of the Federal Rules of Appellate Procedures.

STATEMENT OF THE ISSUE

ISSUE ONE: Whether the U.S. District Court for the Northern District of Texas ERRED IN in denying/dismissing petitioner's 28 USC § 2254 application as time barred by limitations?

ISSUE TWO, SPEED TRIAL VIOLATION

QUESTION NUMBER ONE; DID THE DISTRICT COURT ERR IN FINDING THAT APPLICANT'S FEDERAL PETITION WAS TIME-BARRED?

Basically, the applicant had contended in the face of summary judgment in the lower court aht his federal petition was not in fact time-barred, due to equitable tolling because he could not have filed a state writ of habeas corpus application wihtout the from the Texas Court of appeals. See Exparte Brown 662 SW2d 3 (Tex. Crim appeal 1983).

For equitable tolling to apply, the applicant was required to prove that (1) he pursued his right diligently and (2) he was prevented from timely filing by some extraordinary circumstances. Howland v. Quarterman, 507 F3d 840, 845 (5th Cir. 2007) One (1) of the extraordinary circumstances "must result from external fatcros beyond [applicant's] control; delays of the [applicant's] own making do not qualify, In re Wilson, 442 F3d 872 875 (5th Cir. 2006).

In Lawrence v. Florida, 127 SCt. 1079, 1085 (2007)"the mandate has to be issue to start the clock for 1 year AEDPA."..... emphasis added mine. Also, under the 2244(d)(1)(A), the limitations period runs from "the date on which judgment become fianl by conclusion of direct review or the expiration of the time for seeking such review. Roberts v. Cockrell, 319 F3d 690, 694 (5th cir. 2003), or the deadline for filing a petition for discretionary review. Texas REQUIRES a petitioner seeking a PDR to file the PDR within thirty days of the date of affirmance.

STATEMENT OF THE CASE

A. Proceedings Below

On 6/12/95 Appellant, Rafael Arriaza Gonzalez (hereon "appellant") was indicted for murder, and a re-indictment was followed 5/25/01.

Nearly ten (10) years later on **July 14, 2005**, appellant was found guilty by a Texas Dallas jury and sentenced to 30 years. Case-265th Judicial District Court styled The State of Texas v. Rafael Arriaza Gonzalez cause# F01-01091.

The Fifth Court of Appeals, Dallas, affirmed his judgment on **July 12, 2006**, and appellant did not file for Discretionary Review,* but instead filed his initial state writ of habeas corpus (§ 11.07 TCCP) on 2/8/07, then was dismissed 4/11/07 for non-compliance, then this appellant refiled correct §11.07 **July 2, 2007**, and denied **11/21/07**.

INSTANT PROCEEDINGS

On **January 24, 2008**, appellant filed/mailed his instant federal 28 USC § 2254. Then on **April 11, 2008** the respondent (TDCJ Director Nathaniel Quarterman); filed his "RESPONDENT ANSWER WITH BRIEF IN SUPPORT" recommending § 2254 application be dismissed as time barred. On 8/20/08 the U.S. District Court for the Northernm District of Texas denied/dismissed with prejudice appellant's application § 2254, as time-barred. On August 30, 2008, appellant mailed his timely notice of appeal (filed 9/4/08), and this 5th Court of Appeal notifies appellant **Oct. 31, 2008**, he has 40-days to file Certificate of Appealability brief in support FILED TODAY 12/09/08.

***MANDATE** was issued September 26, 2006, exhausting all state appeals.

SPEEDY TRIAL VIOLATION
SEE ENCLOSED TRANSCRIPTS EXHIBITS
NO GOOD FAITH ACTION TAKEN AT OR NEAR TIME OF INCIDENT

The state has a duty to exercise due diligence in the apprehension abroad. The U.S. Supreme Court decision in Doggett is directly on point. The Court places a duty in law enforcement to extend their search for a suspect beyond the geographical borders of the U.S. The Court States that; "for six years, the government's investigators made no serious effort to test their progressively more questionable assumption that Doggett was living abroad, and had they done so, they could have found him within minutes.

While the government's lethargy may have reflected no more than Doggett's relative unimportance in the world of drug trafficking it was still findable negligence..." Doggett v. U.S. 505 U.S. 647, 112 SCt. At 652-3. (emphasis added). Here, the lead investigator, Renfro, had knowledge not only that the defendant was a from Guatemala but also what department, what municipality and what village. Renfro knew "where all persons involved are from." (quoting his own notes). In Renfro's affidavit dated April 16, 2001 he admits that "[d]uring my investigation I learned that the suspect had fled the country and was reportedly back in Guatemala staying with his family in Mordasang, Guatemala." (emphasis added). His notes admitted at trial dated June 13, 1995, that he did bother to consult nor even review, lists the location of the suspect.

There is no need to speculate to the government's knowledge of a defendant's specific whereabouts. In

"**The Treaty for the Mutual Extradition of Fugitives From Justice**, 33 Stat2147 & 55 Stat10977 it does not require that a suspect be incarcerated.

See Enclosed Exhibits Transcripts

GOVERNMENT NEGLIGENT IN NOT ATTEMPTING ACTION TO SPEED UP EXTRADITION

After the appellant was in custody of the Guatemala authorities the government could have taken action & attempt to speed up extradition. At some point a direct request at the highest levels might have yielded results, **United States v. Packer**, 857 F.supp. 726, 731 (C.D.Cal. 1994). Intervention by the elected official at the Dallas County District Attorne's office with the Federal government or the embassy in Guatemala may have yielded results. Speedy trial issues could have been mentioned in the extradition paperwork to relay those concerns to the federal agendy working on behalf of the county as well as the Guatemala counterparts.

This appellant presented himself in the U.S. Embassy in Guatemala on February 7, 2001 presenting a passport with his true name and date of birth. He was in the presence of U.S. authorities yet they had no information regarding a warrant status in the United States. As Luz Del Cid testified, "it would be easy" to find someone in her village in Guatemala.

Detective Renfro had specific information that he chose not to use, he could have had someone arrested within minutes, and he had very specific information of that Marajuan Morazan Departamento El Progreso Gustatoya Guatemala C.A. the hometown of this appellant.

Speedy Trial Violation

APPELLANT FILED MOTION TO DISMISS INDICTMENT

The indictment alleges conduct that occurred June 12, 1995. The case was filed with the alleged suspect at large, indicted and assigned cause number f97-31860. It was re-preseented to the grand Jury on May 23, 2001, and assigned cause number F01-01091.

The U.S. Federal Government, through Special Agent Alexis Vasquez and others at the FBI, notified the Dallas Co. D.A.'s Office of the appellant's custody in Guatemala. Investigator Jeff Shaw was notified on March 2001, and appellant was not brought into the custody of Dallas Co. Sherrif until the 3rd day of August 2004.

Three (3) years and (5) months elapsed from the time the State was placed on notice of the appellant's apprehension to the time he had been delivered to the Dallas Co. Jail. The appellant nor his defense Counsel was or had committed any act or omission contributed to these delays.

On April 22nd 2005, appellant's defense counsel filed his motion to dismiss the indictment for failure of the state to furnish a speedy trial.

The four factors of the test for speedy trial under the Sixth Amendment to the U.S. Constitution are: 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of his speedy trial right, and 4) prejudice to the defendant from the delay, **Barker v. Wingo**, 407 U.S. 514, 531, 33 LEd3d 101, 92 SCt. 2182 (1972). The test applied for determining whether there is a speedy trial violation is the same under the Sxith Amendment to the U.S. Constitution and Art, I, Section 10 of the Texas Constitution, see **Harris v. State**, 827 SW2d 949, 956 (Tex.Crim.App), cert, denied, 506 U.S. 942, 113 SCt, 381, 121 LEd2d 292 (1992); **Hall v. State**, 699 SW3d 220, 221 (Tex.Crim.App. 1995).

LENGTH OF DELAY; Most delays of eight months or longer are considered presumptively unreasonable and prejudicial, **Pierce v. State**, 921 SW2d 291 (Tex.App-Corpus Christi 1996); **Doggett v. U.S.**, 505 U.S. 647, 112 SCt. 2686, 2691 n.1, 120 LEd2d 520 (1992); **Harris v. State**, 827 SW2d 949, 956 (Tex.Crim.App).

REASON FOR DELAY; It is the State's burden to establish an excuse for the delay, **Pierce v. State**, 921 SW2d 291 (Tex.App.-Corpus Christi 1996) **State v. Empak, Inc.**, 889 SW2d 618, 621 Tex.App.-Houston [14th Dist.] 1994, pet. ref'd). **State v. Hernandez**, 830 SW2d 631, 634(Tex.App.-San Antonio 1992, no pet.). The State's negligence, however innocent, militates against the State. **Pierce v. State**, 921 SW2d 291 (Tex.App-Corpus Christi 1996) **Empak**, 889 SW2d at 624; **Branscum v. State**, 750 SW2d 892, 895(Tex.App-Amarillo 1988, no pet.).

LENGTH OF DELAY

Most delays of eight months or longer are considered presumptively unreasonable and prejudicial, **Pierce v. State**, 921 SW2d 291 (Tex.App.-Corpus Christi 1996); **Doggett v. U.S.** 505 U.S. 647, 112 SCt 2686, 2691 n.1, 120 LEd2d 520 (1992); **Harris v. State**, 827 SW2d 949, 956(Tex.Crim.App). The length of the delay in this case was nine years and nine months when taken to trial. Now calculating the additional 4 years equals a total of years this appellant been illegally incarcerated.

REASON FOR DELAY

It is the State's burden to establish an excuse for the delay, **Pierce v. State**, 921 SW2d 291(Tex.App.-Corpus Christi 1996) **State v. Empak**, Inc., 889 SW2d 618, 621 (Tex.App.-Houston [14th Dist.] 1994, pet. ref'd). **State v. Hernandez**, 830 SW2d 631, 634(Tex.App-San Antonio 1992, no pet.). The State's negligence, however innocent, militates against the State, **Pierce v. State**, 921 SW2d 291(Tex.App—Corpus Christi 1996); Empak, 889 SW2d at 624; **Branscum v. State**, 750 SW2d 892, 895 (Tex.App.-Amarillo 1988, no pet.). And this appellant's defense counsel always asserted that there was no reasonable excuse in law for the delay.

DEFENDANT'S (THIS APPELLANT) ASSERTION OF HIS SPEEDY TRIAL RIGHT

Defendant has workek to secure his return to Dallas, Texas in order to resolve his case. Any claim that he did not assert his right and is therefore prevented from raising a motion to dismiss is specious and he did file his motion to dismiss on

PREJUDICE TO THE DEFENDANT (THIS APPELLANT) FROM THE DELAY

"Prejudice...shold be assessed in the light of the [following] interest...which the speedy trial right was designed to protect[:] (1) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."**Pierce v. State**, 921 SW2d 291 (Tex.App-Corpus Christi 1996) **Barker v. Wingo**, 407 U.S. 514, 531, 33 LEd3d 101, 92 SCt 218291972).

When this appellant assert his speedy trial right with a motion to dismiss on and was denied by the trial court on and again asserted on appeal to the Texas Court of Criminal appeals on and denied by this court in it's legal opinion on he was funadmentally denied his right Guaranteed by the Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Texas Constitution this appellant now seeks the proper judicial review by this HONORABLE Court of Appeals for the Fifth Circuit in New Orleans, Louisiana.

APPELLANT'S ASSERTION OF HIS SPEEDY TRIAL RIGHTS

Appellant was not aware of this indictment until March of 2001. Any claim that he did not assert his right and is therefore prevented from raising a motion to dismiss is specious. Appellant, Mr. Gonzalez's, action of entering the Embassy in Guatemala demonstrates that he did not have knowledge of his indictment. He was living conspicuously in Guatemala having a passport in his own name. It is the burden of the government to rebut or prove that the appellant know of his pending indictment. See Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 2691 n.1, 120 L.Ed2d 520 (1992); Pierce v. State, 921 S.W.2d 291 (Tex.App.-Corpus Christi 1996); Harris v. State, 827 S.W.2d 949, 956 (Tex.Crim.App) "most delays of eight months or longer are considered presumptively unreasonable and prejudicial.

Additionally, the affidavit of Detective Renfroe long with the extradition papers were not handed over to the defense until (2) weeks before trial was set for March 7, 2005. Also, all the documents from federal government were not revealed until March 15, 2005.

All along this appellant has asserted his right to speedy trial in DUE COURSE.

PREJUDICE TO THE APPELLANT FROM THE DELAY

"Prejudice.".. should be assessed in the light of the [following] interests...which the speedy trial right was designed to protect[:] (1) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. "Pierce v. State, 921 S.W.2d 291 (Tex.App.-Corpus Christi 1996); Barker v. Wingo, 407 U.S. 514, 531, 33 l.Ed.2d 101, 92 S.Ct. 2182 (1972).

Appellant, Mr. Gonzalez, was asked to present a defense at trial to an indictment that had happened nearly ten (10) years before that trial commence. He was unable to properly assist in the preparation of his defense. "Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." Barker at 532. Impairment of one's defense is the most difficult form of speedy trial prejudice to prove because of time's erosion of exculpatory evidence that testimony can rarely be shwon. Dogget at 655. Citing, Barker at 532.

Furthermore, he was held in Guatemala for three years and five months, Since the date of his incarceration in Guatemala over four years had passed. This appellant has and is suffering "an oppressive illegal incarceration" as well as suffered a great deal of anxiety and concern as a result of the bad faith negligence of the state. Not counting this last 4 years in the illegal restrainted at this Texas Department of Criminal Justice Institutional Unit where he is presently incarcerated. (NOTE: The Texas County of Dallas ahd a 1980-90 racist &

prejudice conviction rate where thanks to preserved DNA 20 & (in the future possibly more) have been EXONERATED cleared INNOCENT!

* * * *

APPENDIX Q-1

[SEAL]
Court of Appeals
Fifth District of Texas at Dallas

MANDATE

TO THE 265TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY, GREETINGS:

Before the Court of Appeals for the Fifth District of Texas, on the 12th of July, 2006, the cause on appeal to revise or reverse the judgment between

RAFAEL ARRIAZA GONZALES A/K/A RAFAEL ARRIAZA GONZALEZ,
Appellant

No. 05-05-01140-CR
V.

THE STATE OF TEXAS,
Appellee

Appeal from the 265th Judicial District Court of Dallas County, Texas (Tr.Ct.No. F01-01091-TR). Opinion delivered by Justice Lang, Justices Wright and Moseley participating.

Was determined; and therein this Court made its order in these words:

> Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

WHEREFORE, WE COMMAND YOU to observe the order of the Court of Appeals for the Fifth District of Texas, in this behalf, and have it duly obeyed and executed.

WITNESS, the HON. LINDA THOMAS, Chief Justice of the Court of Appeals, with the Seal thereof affixed, at the City of Dallas, this 26th day of September, 2006.

OFFICE OF THE CLERK

By /s/ Sandra Johnson
DEPUTY CLERK

APPENDIX Q-2

In The
Court of Appeals
Fifth District of Texas at Dallas

.....

No. 05-05-01140-CR

.....

RAFAEL ARRIAZA GONZALES a/k/a RAFAEL ARRIAZA GONZALEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

.....

On Appeal from the 265th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F01-01091-TR

.....

OPINION

Before Justices Wright, Moseley, and Lang
Opinion By Justice Lang

Rafael Arriaza Gonzalez[3] appeals his conviction for murder. A jury found appellant guilty and assessed punishment at thirty years' confinement. In his sole issue on appeal, appellant contends the

---

[3] The record contains two different spellings of appellant's last name: (1) Gonzales, and (2) Gonzalez. We note that appellant uses the second spelling. Accordingly, we use that spelling in this opinion.

trial court erred in denying his motion to dismiss for violation of his right to a speedy trial. We decide against appellant on his sole issue and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 2, 1995, at approximately 12:30 p.m., Roberto Velasquez was killed near an apartment complex in Irving, Texas. Luz Del Cid, a sister of Velasquez, testified that she saw appellant shoot Velasquez several times from the front seat of a parked car as Velasquez stood near the car. A second eyewitness, Darlene Nicole Keener, was baby-sitting nearby and looked up when she heard the gunshots. After shooting Velasquez, appellant drove away.

Detective Harold Renfroe, a police officer with the City of Irving, showed separate photo lineups to Del Cid and Keener. Both witnesses identified appellant from the photo lineups. Del Cid said appellant and Velasquez had known each other since childhood and had lived in the same small community of Morazan, Guatemala.

Renfroe obtained a warrant for appellant's arrest and checked three addresses and several other locations in the Dallas area where he believed appellant might be found. However, he was unable to locate appellant. Del Cid then told Renfroe that she had heard that appellant had gone to California.

Appellant was indicted for murder on June 28, 1995. Also on that date, Renfroe posted appellant's warrant on TCIC and NCIC, state and national criminal databases for law enforcement. On July 26, 1995, appellant's warrant was sent to the Dallas Sheriff's Office to be served. Officers went to the address listed on the warrant on August 10, 1995, in an attempt to serve the warrant. Because appellant

was not found at that address, the warrant was then sent to the Violent Crimes Unit of the Dallas Sheriff's Office, which was responsible for trying to ascertain additional information to locate individuals in such cases.

In August 1995, Del Cid was contacted by her mother, who lived in Morazan, Guatemala. Del Cid's mother told Del Cid that she had seen appellant recently in Guatemala, and that he had threatened her on several occasions. Del Cid relayed this information to Renfroe. Renfroe called the U.S. Embassy in Guatemala and spoke to Lance Ruth. Renfroe told Ruth there was a warrant out for appellant and appellant had been seen in Guatemala. On March 6, 1996, Renfroe learned from a representative of a Dallas bonding business that Albino Chivarerra, an acquaintance of appellant who was also being sought in connection with the Velasquez murder, was possibly in Morazan, Guatemala. Renfroe called the U.S. Embassy in Guatemala and the U.S. State Department office in Dallas, Texas, and informed them of Chivarerra's possible location. Between March 6, 1996, and March 30, 2001, Renfroe obtained no additional information as to appellant's whereabouts and had no further involvement in the case.

Renfroe did not inform the Dallas Sheriff's Office that appellant had been seen in Guatemala. The Violent Crimes Unit of the Dallas Sheriff's Office ran a nationwide database search under appellant's name on April 16, 1997, but no new information was found. On February 7, 2001, appellant's Guatemalan passport was stamped by the U.S. Embassy in Guatemala to indicate that a visa application was

received from appellant on that date. However, the U.S. Embassy did not contact Renfroe or the Dallas Sheriff's Office at that time.

Appellant was incarcerated in Guatemala on March 8, 2001, for three murders not connected with this case. The Dallas Sheriff's Office was contacted by the U.S. Federal Bureau of Investigation on March 30, 2001, and told that appellant was in custody in Guatemala. The Dallas Sheriff's Office then contacted Jeff Shaw, chief investigator with the Dallas County District Attorney's Office, and informed him of appellant's location.

Shaw called the U.S. Justice Department's Office of International Affairs in Washington, D.C., on April 3, 2001, and notified them that appellant had been found. On May 8, 2001, the Office of International Affairs sent provisional arrest documentation to Guatemala.

A new warrant was issued for appellant on June 6, 2001. Although appellant was known to be in jail in Guatemala, officers from the Dallas Sheriff's Office again went to appellant's last known address in Garland, Texas, to attempt execution of that warrant. The Dallas County District Attorney's Office received notice on June 26, 2001, that provisional arrest documents had been served on appellant in Guatemala. The District Attorney's Office sent formal extradition documents to the Guatemalan Attorney General on July 24, 2001. On September 26, 2001, the Guatemalan court sent the Dallas County District Attorney's Office initial court approval of the provisional arrest documents. Although it is not clear when the Guatemalan government found in favor of appellant's extradition

to the United States, appellant filed an appeal of extradition on October 8, 2001.

The Office of International Affairs sent an e-mail to the Guatemalan Embassy on September 4, 2002, inquiring as to the status of appellant's appeal of extradition. The Embassy replied that the appeal was in its final stages. On August 25, 2003, the Office of International Affairs sent an e-mail to the Guatemalan Minister of Foreign Relations inquiring as to the status of appellant's extradition. The Office of International Affairs was told that appellant had filed another appeal, which was pending.

On April 30, 2004, Tom Black of the Office of International Affairs asked the Guatemalan Attorney General to investigate the matter of appellant's extradition. On May 12, 2004, the Guatemalan Attorney General sent a letter to Black, stating that the extradition papers required the signature of Guatemalan President Portillo, who had been removed from power in January 2004. At the request of Black, the U.S. ambassador to Guatemala asked the new Guatemalan government to get involved. Appellant's extradition papers were signed on July 13, 2004. On July 29, 2004, appellant was placed in jail in Dallas.

Appellant's trial was initially set for December 6, 2004. On December 7, 2004, the case was reset by agreement and without objection for March 7, 2005. The record is unclear as to why trial did not commence on March 7, 2005. However, appellant did not object to a second resetting of his trial.

On March 14, 2005, appellant filed a motion to dismiss alleging violation of his right to a speedy trial. The trial court heard evidence regarding

appellant's motion to dismiss on March 25, 2005, March 31, 2005, and April 22, 2005. On May 13, 2005, appellant's motion was denied. Trial commenced on July 11, 2005, and was completed by July 14, 2005. Appellant offered no testimony at trial. Following his conviction and sentencing by the jury, appellant filed this appeal.

II. SPEEDY TRIAL

Appellant contends he was denied his right to a speedy trial because his jury trial proceeding was scheduled more than nine years after the alleged murder for which he was indicted. He argues that the delay was the fault of the State and that it prejudiced his defense. The State contends that appellant waived his speedy trial right by fleeing to Guatemala, fighting his extradition, and voluntarily resetting his trial twice. Further, the State argues, appellant failed to timely assert his right to a speedy trial, and the delay did not cause him harm.

A. Standard of Review

The United States Constitution and the Texas Constitution both provide that every accused shall have the right to a speedy trial. U. S. Const. amend. VI; Tex. Const. art. I, §10. In determining whether a criminal defendant has been denied his federal or state constitutional right to a speedy trial, a court must use a balancing test in which the conduct of both the State and the defendant are weighed. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Shaw v. State*, 117 S.W.3d 883, 888 (Tex. Crim. App. 2003). The factors to be weighed in the balance include, but are not necessarily limited to: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) the prejudice to the

defendant resulting from the delay. *Barker*, 407 U.S. at 530; *Shaw*, 117 S.W.3d at 888-89. The factors are all related and must be considered together with other relevant circumstances on a case by case basis. *Barker*, 407 U.S. at 533. No single factor is necessary or sufficient to establish a violation of a defendant's right to a speedy trial. *Id.*

In reviewing the trial court's decision on a speedy trial issue, the appellate court applies a bifurcated standard of review, meaning that an abuse of discretion standard applies to the factual components and a de novo standard applies to the legal components. *State v.* Munoz, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999). The appellate court must review the trial court's ruling in light of the arguments, information, and evidence that was available to the trial court at the time it ruled. *Dragoo v. State*, 96 S.W.3d 308, 313 (Tex. Crim. App. 2003). The trial court's ruling must be upheld if it is supported by the record and correct under the applicable law. *Shaw*, 117 S.W.3d at 889.

B. Application of *Barker* Factors

1. Length of Delay

The first factor, the length of the delay, is measured from the time the defendant is arrested or formally accused. *United States v. Marion*, 404 U.S. 307, 313 (1971). The length of the delay is, to some extent, a triggering mechanism, so that a speedy trial claim will not be heard until passage of a period of time that is prima facie unreasonable under the circumstances. *Doggett v. United States*, 505 U.S. 647, 651-52 (1992); *Barker*, 407 U.S. at 530. "If the accused makes this showing, the court must then consider, as one factor among several, the extent to

which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." *Doggett*, 505 U.S. at 652.

In general, delay approaching one year is sufficient to trigger a speedy trial inquiry. *Id.* at 652 fn. 1. Appellant was indicted on June 28, 1995. His trial began on July 11, 2005. The State concedes that a delay of ten years is sufficient to trigger a speedy trial inquiry. Moreover, the delay here stretched significantly beyond the minimum needed to warrant such an inquiry. *See Shaw*, 117 S.W.3d at 889. Consequently, this factor weighs in favor of finding a violation of appellant's right to a speedy trial. *Id.*

2. Reason for Delay

The State bears the initial burden of justifying a lengthy delay. *Emery v. State*, 881 S.W.2d 702, 708 (Tex. Crim. App. 1994). In light of a silent record or one containing reasons insufficient to excuse the delay, it must be presumed that no valid reason for the delay existed. *See Turner v. State*, 545 S.W.2d 133, 137-38 (Tex. Crim. App. 1976). In examining the reasons for the delay, "different weights should be assigned to different reasons." *Munoz*, 991 S.W.2d at 822 (quoting *Barker*, 407 U.S. at 531). A deliberate attempt to delay the trial to hamper the defense should be weighted heavily against the State. *Barker*, 407 U.S. at 531. A more neutral reason, such as negligence or overcrowded courts, should be weighted less heavily. *Id.* Finally, a valid reason justifies appropriate delay. *Id.*

a. June 28, 1995 to March 30, 2001

Appellant first argues that his right to a speedy trial was violated because, beginning in June 1995,

there was a "six-year period of inaction by the District Attorneys and law enforcement agencies." He contends that a lack of effective communication between the Irving Police Department and the Dallas County Sheriff's Office resulted in a complete cessation of action between March 1996 and March 2001. Further, he maintains, that lack of activity led to the failure of the U.S. Embassy in Guatemala to contact law enforcement officials when appellant applied for a visa on February 7, 2001. Appellant argues that the fact that Assistant District Attorney Jeff Shaw was able to extradite appellant from Guatemala after receiving the case in 2001 shows that appellant could have been apprehended and brought to the United States sooner.

The State asserts that the six-year delay between the date of the presentment of the indictment and the discovery of appellant's whereabouts was justified because it was due entirely to appellant evading the law. The State contends that Detective Renfroe searched for appellant at three residences in the Dallas area and posted appellant's warrant on NCIC and TCIC. Renfroe also later contacted the U.S. Embassy and the U.S. State Department to provide them with information regarding appellant's whereabouts. The Dallas Sheriff's Office attempted to serve an arrest warrant on appellant soon after the murder and later ran a search in a nationwide database to gather any new information on appellant. The State argues that because appellant's location between June 1995 and March 2001 was unknown to the State, appellant's evasion was beyond the State's control and should not be weighed against the state.

The record shows that appellant left the United States and traveled to Guatemala after the murder of Velasquez. Although there is no evidence that appellant used an alias or tried to conceal his whereabouts during that time, his location within Guatemala was unknown to the State until his arrest in that country in March 2001. Detective Renfroe and the Dallas Sheriff's Office pursued all leads made known to them from 1995 to 2001, including searching for appellant locally and contacting the U.S. Embassy in Guatemala and the U.S. State Department. *See Lott v. State*, 951 S.W.2d 489, 493-95 (Tex. App.-El Paso 1997, reh'g denied) (finding no evidence of failure to follow reasonable leads where prosecution had no information as to defendant's specific location); *Burgett v. State*, 865 S.W.2d 594, 597 (Tex. App.-Fort Worth 1993, pet. ref'd) (concluding that difficulty in locating appellant did not amount to procrastination where State visited appellant's address, contacted his known associates, subpoenaed his wife's phone records and staked out her place of employment, checked vehicle registration records in all fifty states, and entered appellant's name as a fugitive in state and national databases).

Appellant argues that the Dallas Sheriff's Office "would have taken steps" had they been informed by Detective Renfroe prior to March 2001 that appellant was in Guatemala. The record does not indicate, however, what those steps would have been or how such steps would have led to appellant's apprehension. Appellant further contends that increased contact with the U.S. Embassy in Guatemala might have led to his being located in

February 2001 rather than March 2001. However, a decision not to explore a particular search avenue to the fullest extent possible does not render the overall search unreasonable or negligent. *See Lott*, 951 S.W.2d at 495 (finding that although detection of a mistake in Veterans' Administration records might have led police to defendant more quickly, search was not unreasonable or negligent).

The cases relied on by appellant in support of his argument are distinguishable from this one because in each of those cases there was some evidence that the prosecution knew specifically where the defendant could be located, but failed to check on the defendant's status. *See Doggett*, 505 U.S. at 649-50 (government negligent because it knew fugitive was held in prison in Panama on drug charges, but failed to check status with Panamanian government); *Pierce v. State*, 921 S.W.2d 291, 294 (Tex. App.-Corpus Christi 1996, no pet.) (prosecution negligent because it had correct Houston address for defendant, but made no attempts to locate defendant there); *Branscum v. State*, 750 S.W.2d 892, 893-94 (Tex. App.-Amarillo 1988, no pet.) (prosecution negligent because it knew defendant was in Oklahoma mental hospital and assumed, without checking, that defendant was incompetent to stand trial). In this case, it was not until appellant was arrested and jailed for three murders in Guatemala in March 2001 that U.S. law enforcement officers became aware of appellant's location.

An appellate court will not disturb the trial court's ruling on a motion to dismiss an indictment absent an abuse of discretion. *Lott*, 951 S.W.2d at 494. We conclude that the record in this case

supports a determination that the State used reasonable diligence in its pursuit of appellant and was not negligent in seeking appellant's apprehension between June 28, 2005, and March 30, 2001.

b. March 30, 2001 to July 29, 2004

Appellant asserts that the extradition proceedings initiated by the State could have been handled more expeditiously had the State "been familiar with Interpol procedures and resources." The State argues that the delay between March 30, 2001, the date the State learned of appellant's whereabouts, and July 29, 2004, the date appellant was placed into jail in Dallas, was due entirely to appellant's efforts in fighting his extradition and was not due to any negligence or failure of diligence on the part of the State. Therefore, the State contends, this portion of the delay was justified.

The record shows that extradition proceedings were initiated by the State in April 2001. The State prepared and submitted all required documentation pertaining to the extradition and requested periodic updates on appellant's extradition appeals. Moreover, the State enlisted the assistance of the Office of International Affairs and the U.S. Ambassador to Guatemala in obtaining the necessary signatures on appellant's extradition paperwork.

Appellant did not sign a waiver of extradition. When his extradition was granted by a Guatemalan court, he appealed the court's ruling. When he lost that appeal, he appealed again.

Delay caused by acts of the accused that are beyond the control of the prosecution should not

weigh against the State. *Burgett*, 865 S.W.2d at 597. Because appellant was in large part responsible for the delay from March 30, 2001, to July 29, 2004, that delay was justified and does not weigh against the State.

c. July 29, 2004 to July 11, 2005

Appellant argues that even after he was placed in the Dallas County jail, there was further delay because the State tried a different person on the date originally scheduled for his trial. The State contends that appellant's trial was reset twice by agreement of the parties and without objection. Further, the State asserts, appellant filed his motion to dismiss on March 14, 2005, thereby adding to the delay. Had appellant not agreed to reset his trial date and not filed his motion to dismiss, the State argues, he would have had his trial on December 6, 2004, just over five months after he was placed into the Dallas jail. The State maintains that those five months of delay can be classified as a reasonable period for case preparation and should not weigh against the State.

The record does not contain any evidence that appellant objected to the resetting of his case or that he was not in agreement with the resetting. Accordingly, the trial court reasonably could have concluded that the delay from July 29, 2004 to July 11, 2005, was valid and justified.

3. Assertion of Right

Although a defendant's failure to seek a speedy trial does not amount to a waiver of the speedy trial right, failure to seek a speedy trial makes it difficult for a defendant to prevail on a speedy trial claim. *Barker*, 407 U.S. at 532. A defendant's failure to make a timely demand for a speedy trial indicates

strongly that he did not really want one and that he was not prejudiced by not having one. *Dragoo*, 96 S.W.3d at 314. The longer the delay becomes, the more likely it is that a defendant who really wanted a speedy trial would take some action to obtain one. *Id.* Thus, a defendant's inaction weighs more heavily against a violation the longer the delay becomes. *Id.* Further, when the failure to assert the right is made late and never heard until trial, it weakens all the other *Barker* factors because they are so dependent upon the assertion. *Haney v. State*, 977 S.W.2d 638, 643 (Tex. App.-Fort Worth 1998, pet. ref'd). A defendant's motivation in asking for a dismissal, rather than seeking a trial setting, may sometimes attenuate the strength of his claim. *Phillips v. State*, 650 S.W.2d 396, 401 (Tex. Crim. App. [Panel Op.] 1983). Asking for a dismissal, however, does not necessarily result in waiver of the claim. *State v. Perkins*, 911 S.W.2d 548, 553 (Tex. App.-Fort Worth 1995, no pet.). Defense counsel may legitimately feel that a long delay has caused his client so much prejudice that dismissal is warranted. *Phillips*, 650 S.W.2d at 401. Because a defendant's assertion of the right must be viewed in the light of the defendant's other conduct, each case must turn on its own facts. *Burgett*, 865 S.W.2d at 598.

Appellant contends that there is no evidence he was aware of any arrest warrant having been filed against him prior to June 2001, when he was served with extradition papers. Therefore, he argues, he had no opportunity to assert his right to a speedy trial during that time. The State contends that, even assuming appellant did not know of the pending charge against him until June 2001, he did not assert

his speedy trial right until almost four years later. Furthermore, the State argues, when appellant finally did assert his right, he sought a dismissal of the charge rather than asking for a trial. Accordingly, the State contends, this factor weighs heavily in favor of the State and substantially weakens the other *Barker* factors.

After the State located appellant in Guatemala in March 2001, appellant fought extradition through two appeals over the course of three years. Further, although counsel was appointed for appellant in July 2004, his motion to dismiss for failure to afford a speedy trial was not filed until March 14, 2005, one week after his scheduled trial date. *See Dragoo*, 96 S.W.3d at 314-15 (finding that assertion of speedy trial right on eve of trial weighed strongly against defendant, where he was represented by counsel at all relevant times). We conclude appellant's failure to diligently assert his right to a speedy trial weighs heavily against him.

4. Prejudice Caused by Delay

Prejudice should be assessed in light of the interests a speedy trial is designed to protect: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, and (3) guarding against impairing the accused's defense by loss of exculpatory evidence and dimming memories. *Barker*, 407 U.S. at 532. "Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *Shaw*, 117 S.W.3d at 890 (quoting *Barker*, 407 U.S. at 532). "Furthermore, with respect to the third interest, relating to the defendant's ability to defend himself,

affirmative proof of prejudice is not essential to every speedy trial claim, because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." *Shaw*, 117 S.W.3d at 890 (quoting *Doggett*, 505 U.S. at 655). "On the other hand, this presumption of prejudice to the defendant's ability to defend himself is 'extenuated . . . by the defendant's acquiescence' in the delay." *Shaw*, 117 S.W.3d at 890 (quoting *Doggett*, 505 U.S. at 658).

Appellant acknowledges that testimony of two eyewitnesses is strong enough to effectively foreclose a challenge to the sufficiency of the evidence. However, appellant asserts that there were at least three other persons present in two cars at the scene of the alleged murder. Thus, appellant argues, questions were effectively raised as to the possible motive and circumstances surrounding the killing. In addition, appellant asserts that evidence was apparently removed from one of Velasquez's boots by persons present at the scene, raising questions regarding the possibility of drug trafficking. Had a timely investigation been conducted by the defense, appellant argues, those avenues of inquiry "might well have been established." Appellant contends that when defense counsel was appointed in July 2004, any opportunity for a meaningful investigation was gone.

The State argues that no presumption of prejudice is warranted in this case because appellant was the cause of the trial delay and because the State used diligence in attempting to bring him to trial. In the absence of a presumption of prejudice, the State asserts, appellant has failed to meet his

burden to affirmatively establish that he was harmed from the delay in that his claim of lack of sufficient time for reasonable investigation is vague and unsupported. Even if a presumption of prejudice applies, the State argues, such prejudice is extenuated by appellant's active role in, and acquiescence to, the delay. The State further contends that appellant's claimed presumptive harm of lack of time for meaningful investigation is rebuttable in that five and one-half months is long enough to make a reasonable investigation into the case. Finally, the State asserts that the presumptive harm claimed by appellant is not sufficiently identified, and therefore does not satisfy the *Barker* requirement for harm.

Although appellant argues that it might have been possible to establish alternative motives or circumstances regarding the killing, he does not make any showing that he exercised diligence in attempting to do so. *See Burgett*, 865 S.W.2d at 598 (finding that where appellant made no showing that he exercised due diligence to locate missing witness, he had not shown prejudice resulting from trial delay); *Munoz*, 991 S.W.2d at 829 (determining that bare assertion of dimming memories does not constitute "some showing" of an impairment to the defense). Accordingly, he has not shown that the delay weakened his ability to establish such alternative motives or circumstances. We conclude that because appellant has not shown prejudice caused by the delay, this factor does not weigh in appellant's favor. *See Lott*, 951 S.W.2d at 496 (finding that presumed impairment of defendant's defense did not outweigh the fact that he was largely

responsible for the delay and fought extradition after being located).

III. CONCLUSION

Applying the balancing test of *Barker* and the appropriate standard of review, we conclude that the trial court did not err in denying appellant's motion to dismiss for violation of the right to a speedy trial. The interval between appellant's indictment and his trial was long enough to be presumptively prejudicial. However, the record supports a determination that the State used reasonable diligence in its pursuit of appellant and was not negligent in seeking appellant's apprehension. Moreover, appellant fought extradition from Guatemala and agreed to the resetting of his trial date on two occasions. The record further shows that although appellant was informed of the charges against him in June 2001, his motion to dismiss for failure to afford a speedy trial was not filed until almost four years later. Finally, appellant articulated no prejudice attributable to the delay, and any presumption of prejudice is extenuated by his own responsibility for the delay.

Accordingly, we decide appellant's sole issue against him. The judgment of the trial court is affirmed.

DOUGLAS S. LANG
JUSTICE

* * * *

APPENDIX Q-3

NO. 05-05-01140-CR

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS, TEXAS

RAFAEL ARRIAZA GONZALEZ
Appellant,

V.

THE STATE OF TEXAS,
Appellee.

Appeal in Cause Number F01-01091-TR
In the 265th Judicial District Court
Dallas County, Texas

BRIEF FOR APPELLANT

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On Appeal

PARTIES TO THE CASE

Pursuant to Rule 38 of the Texas Rules of Appellate Procedure, the parties to the case were:

1. The State of Texas, Appellee
2. **RAFAEL ARRIAZA GONZALEZ**, Appellant

Representing the State of Texas, Appellee, are members of the Dallas County District Attorney's Office, Frank Crowley Courts Building, 133 N. Industrial Boulevard, Dallas, Texas 75207.

Appearing at trial was:

Hon. Bill Hill, District Attorney
Hon. Julie Wilbanks, SBN 24033341
Hon. Brandon Birmingham
District Attorney's office
Frank Crowley Courts Building
133 N. Industrial Boulevard
Dallas, Texas 75207

Representing the Appellant, **RAFAEL ARRIAZA GONZALEZ**, at trial:

Hon. Dan Montalvo
SBN 00795538

Representing the Appellant, **RAFAEL ARRIAZA GONZALEZ**, on appeal:

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TABLE OF CONTENTS

PAGE

Parties to the Case ii
Table of Contents iii
Index of Authorities iv
Statement of the Case 2
Issues Presented for Review 2
Statement of Facts 2-14
Point of Error No. One Restated 15

THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

Summary of the Argument 15-18
Argument 18-23
Prayer 24
Certificate of Service 24

INDEX OF AUTHORITIES

CASES **PAGE**

Barker v. Wingo,
407 U.S. 514, 92 S.Ct. 2183,
33 L.Ed. 101 (1972) 20, 22

Branscum v. State,
750 S.W.2d 892, 895 (Tex.App. – Amarillo 1988,
no pet.) 21

Doggett,
505 U.S. at 652 n. 1, 112 S.Ct. at 2691 n. 1..... 22

Empak,
889 S.W.2d at 624..... 20-21

Pierce v. State,
921 S.W.2d 291
(Tex.App. – Corpus Christi, 1996).....20, 21, 23

State v. Hernandez,
830 S.W.2d 631, 634 (Tex.App. – San Antonio
1992, no pet.) 20

Traylor v. State,
892 S.W.2d 447, 449 (Tex.App. – Beaumont 1995,
pet. Ref'd) 22

NO. 05-05-01140-CR

RAFAEL ARRIAZA GONZALEZ,
Appellant,
vs.
THE STATE OF TEXAS,
Appellee.

IN THE FIFTH DISTRICT COURT OF APPEALS

AT DALLAS, TEXAS

APPELLANT'S BRIEF

On appeal from 265th Judicial District Court
In Cause No. F01-01091-TR
The Honorable Judge Keith Dean

TO THE HONORABLE COURT OF APPEALS:

NOW COMES the appellant, RAFAEL ARRIAZA GONZALEZ, by and through his attorney of record, and respectfully submits his brief setting out points of error of which the appellant complains on appeal. The appellant is seeking to reverse his conviction in Cause No. F01-01091-TR for the felony offense of murder in the 265th Judicial District Court of Dallas, the Honorable Judge Keith Dean, judge presiding.

The jury set punishment at 30 years in the Institutional Division of the Texas Department of Corrections and no fine [R114, 116]. The appellant was sentenced on July 14, 2005, at which time he gave timely notice of appeal [R 116].

STATEMENT OF THE CASE

Offenses	Murder
Enhancements	None
Trial on Guilt/Innocence	Jury
Finding on Guilt	Guilty
Trial on Punishment	Jury
Punishment	30 years in the Institutional Division of the Texas Department of Corrections and no fine

ISSUES PRESENTED FOR REVIEW

THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

STATEMENT OF FACTS

On June 2, 1995, Roberto Alcides Valesquez was gunned down near the Garden Plaza Apartments in Irving, Texas. Luz Del Cid, sister of the deceased, testified that her brother was shot at point-blank range by the appellant, who was seated in a car. Ms. Del Cid said she was standing behind her brother and he fell back into her, mortally wounded. Ms. Del Cid said the appellant and deceased had known each other from their childhood in Guatemala. A second eyewitness, Darlene Nicole Keener, a 14- or 15-year-old teenager at the time, also identified the appellant as the gunman. Miss Keener was babysitting nearby and looked up when she heard the gunshots. Following the shooting, Ms.

Del Cid told lead detective Harold Renfroe that the appellant was the man who killed her brother. The appellant was allegedly sighted in Guatemala a few weeks after the shooting. He was returned to the United States in 1994. The appellant offered no testimony. Relevant testimony of witnesses is set out below:

STATE'S WITNESSES:

HECTOR ADELSO RAMIREZ

Hector Adelso Ramirez, 39, testified that he has known the appellant Rafael Gonzalez since they were boys in Guatemala [Vol. 6, RR 207-208]. The deceased, Roberto Valesquez, was his brother [Vol. 6, RR 209]. Prior to June 12, 1995, he saw his brother every day [Vol. 6, RR 210]. On June 12, 1995, his sister Luz Del Cid called him and told him that his brother had passed away [Vol. 6, RR 211].

LARRY JAMESON

Irving Police Officer Larry Jameson testified that on June 12, 1995, he was called to the Garden Plaza Apartments at 2646 West Grauwyler in Irving, Texas, in regards to a shooting that had just occurred [Vol. 6, RR 219-221]. He saw a young male laying in the foyer of the entryway to the Garden Plaza Apartment [Vol. 6, RR 221]. His sister was right there with him at that time [Vol. 6, RR 221]. The sister of the wounded man told him that her brother had gotten in an argument with a man who had then shot him [Vol. 6, RR 225]. Officer Jameson saw nothing in the wounded man's boot [Vol. 6, RR 238-239]. The lead detective on the case was Detective Renfroe [Vol. 6, RR 239].

CURTIS CHISM

Irving police officer Curtis Chism testified that he's assigned to the Crime Scene Unit [Vol. 6, RR 248]. On June 12, 1995, he went to 2646 West Grauwyler in Irving, Texas [Vol. 6, RR 249]. When he arrived, he met with Officer Dan Miller, who told him there had been a shooting offense in the parking lot. They found a projectile which they had already marked [Vol. 6, RR 250]. Officer Chism made a diagram of the crime scene (State's Exhibit 24) [Vol. 6, RR 261]. Officer Chism seized the projectile but found no other ballistic evidence at the scene [Vol. 6, RR 253]. The police never found a gun [Vol. 6, RR 256]. They took a paint sample from the dumpster there, but never had anything to compare it to [Vol. 6, RR 256]. State's Exhibit 26, a shirt and towel seized at the scene, was received into evidence without objection [Vol. 6, RR 261]. Chism said it appeared that the paramedics tore the shirt off of the victim. He noted that there were four holes in the shirt that appeared to be bullet holes [Vol. 6, RR 264].

CHARLES CLOW

Charles Clow, a firearm and tool mark examiner for the Southwest Institute of Forensic Sciences testified. State's Exhibit 50, a copy of firearms examiner Larry Fletcher's report was received and State's Exhibit 51, a copy, were received into evidence without objection [Vol. 7, RR 18-19]. The firearms examiners determined that the bullet removed during the autopsy of the victim and State's Exhibit 25, a 9 mm caliber bullet (recovered at the crime scene) could have been fired from State's

Exhibit 52, a Browning, or State's Exhibit 53, a Norenko, Mr. Clow said [Vol. 7, RR 22].

SCOTT HUGHES

Scott Hughes, an acrylic warehouse manager for a marble company, was working for his father's company in June of 1995 and living at 2646 West Grauwyler, apartment 120, in Irving, Texas [Vol. 7, RR 33-35]. He was watching TV when he heard three or four gunshots [Vol. 7, RR 38]. When he looked out his window, he saw a Mexican gentleman, about 6' tall, with a red shirt and jeans who had just been hit in the shoulder [Vol. 7, RR 38-39]. Mr. Hughes went outside and saw that the man had several wounds in the face, arm, and chest area [Vol. 7, RR 39]. He had a friend get some towels and waited for the paramedics [Vol. 7, RR 39]. At one point a woman approached the injured person, pulled off his boots. Hughes said it looked like there were drugs and money in his boots, possibly a gun. She shoved it all back into the boots and took off running [Vol. 7, RR 40]. When shown State's Exhibit No. 1, Hughes stated that he vaguely recognized the person as the one that he tried to help [Vol. 7, RR 41]. A woman pulled off the injured man's boots as the paramedics were working on his chest. This seemed odd to Mr. Hughes [Vol. 7, RR 50-51]. Hughes said he saw money and he believed a few drugs and thought a gun might have been in there. He saw a metal object that resembled what he believed to be a weapon [Vol. 7, RR 51]. The woman who took off the boots was a Mexican person [Vol. 7, RR 51]. Hughes figured it might be a drug deal gone bad or something like that [Vol. 7, RR 51]. Hughes said that his girlfriend, Pamela Lane, dialed 911 and reported

the incident at approximately 1:00 p.m. [Vol. 7, RR 54-55]. Hughes told the police he could not identify the shooter [Vol. 7, RR 55].

LUZ DEL CID

Luz Del Cid said she grew up in Guatemala and came to the United States in January of 1989 [Vol. 7, RR 60]. The deceased, Roberto Valesquez, was one of her brothers [Vol. 7, RR 61]. She said she and the appellant had been friends [Vol. 7, RR 61]. They had been friends since they were very young. They were from the same little town in Guatemala [Vol. 7, RR 61]. Her brother (Roberto) and the appellant had also been friends for a long time [Vol. 7, RR 62]. At the time of the alleged murder, she was living with her husband and three children at the Garden Plaza Apartments at 2646 West Grauwyler in Irving, Texas [Vol. 7, RR 62]. In those days her brother always arrived at her apartment to eat and she saw him on June 11, 1995 [Vol. 7, RR 63]

On that same night, the appellant came to her house with Rigoberto and asked her about her brother [Vol. 7, RR 64]. The next day, June 12, 1996, she got up and went to work. She left work at approximate 7:30 p.m., went to pick up her children and went to McDonald's and a furniture store [Vol. 7, RR 64-65]. She saw the appellant and again Rigoberto asked her about her brother and she told him that he was at the house, meaning her apartment [Vol. 7, RR 65]. The appellant and Rigoberto were in separate cars [Vol. 7, RR 65]. The appellant was in a white Honda with a black line and Rigoberto (Ramirez) was in a red car, she said [Vol. 7, RR 66]. In Rigoberto's car was another friend of the appellant, Albino Chivarerra [Vol. 7, RR 66].

When she got to her apartment, the appellant was waiting for her brother, she said [Vol. 7, RR 66]. She walked over to the appellant, who was in his car [Vol. 7, RR 67]. His car was about 12 feet away from her car near the entrance of the Garden Plaza Apartments [Vol. 7, RR 67]. She told the appellant that Roberto was going to Guatemala and the appellant said, yes [Vol. 7, RR 68]. She talked to him four or five minutes until her brother Roberto walked up [Vol. 7, RR 68]. Her brother said, "What's up, Rafa?" The appellant responded, "Nothing." Her brother then asked the appellant, "What do you want?" He responded, "To kill you." [Vol. 7, RR 69]. At that moment he shot him three times, getting a gun from underneath his leg [Vol. 7, RR 69]. She said the appellant said, "I'm going to send you (sic) dead, you bastard." [Vol. 7, RR 69]. He said that to her brother. When her brother was shot, he fell on top of her.

Ms. Del Cid said Rigoberto and Albino were then yelling at the appellant that he should kill her, too [Vol. 7, RR 70]. She ran over and grabbed Albino, trying to hold him until the police could get there. The appellant left the scene and her brother was laying on the ground [Vol. 7, RR 70]. She grabbed Albino by his shirt collar, but when he drove off, she was thrown away from the car [Vol. 7, RR 71]. Her brother told her, "Take my boots off because I have some money there for Mom." Ms. Del Cid said she took $2,500 from the boots and later gave the money to the police when they came to her apartment [Vol. 7, RR 71]. The only thing in her brother's boots was a little chain with a crucifix of Jesus Christ which he carried in his boot [Vol. 7, RR 72]. The

money in the boot was inside a zip lock bag [Vol. 7, RR 72]. A man named Martin Cordova was at the scene as well [Vol. 7, RR 73]. Police accompanied her to her apartment where she called her brother Hector Ramirez to tell him that the appellant had shot her brother [Vol. 7, RR 74].

Roberto talked to the appellant at the window of the appellant's car for two or three minutes before the appellant shot him [Vol. 7, RR 79-80]. Ms. Del Cid proceeded on to the police station and talked to Detective Renfroe. Her brother Hector went to the police station as well [Vol. 7, RR 64]. She kept in close contact with Detective Renfroe for the next few days hoping that they would catch the appellant [Vol. 7, RR 84]. She told Detective Renfroe that she thought the appellant might be in a hotel in Garland [Vol. 7, RR 85]. On June 28, 1995, she identified the appellant in a photographic lineup [Vol. 7, RR 85]. She initialed State's Exhibit 30B, the photograph that she selected [Vol. 7, RR 87]. At the time of the shooting, the shots were fired from close range, Ms. Del Cid said, with the appellant sitting in his car and her brother standing in front of him [Vol. 7, RR 98]. Ms. Del Cid said that that day her brother was in the truck with Martin Cordova. Her brother was the driver and Martin was the passenger. Martin Cordova would have been a witness to the whole incident, she acknowledged [Vol. 7, RR 103].

Because the shooting happened ten years ago, she was not certain whether Martin Cordova took her brother's boots from her or not [Vol. 7, RR 104]. When her brother was shot, the appellant took off real fast, Ms. Del Cid said, so she didn't have a chance to go after him [Vol. 7, RR 118]. She tried to

grab Albino Chivarerra and Rigoberto Ramirez [Vol. 7, RR 118]. Martin Cordova, who was at the scene that day, is now in Guatemala, she said [Vol. 7, RR 118]. When her brother went up to the appellant's car, he had nothing in his hand, Ms. Del Cid said [Vol. 7, RR 119].

DARLENE NICOLE KEENER

Darlene Nicole Keener, 25, testified that in June of 1995, she was 14 or 15 years old and living with her parents and three brothers at the Garden Plaza Apartments in Irving at 2646 West Grauwyler [Vol. 7, RR 124]. On June 12, 1995, her sister brought a nephew over for her to babysit [Vol. 7, RR 126]. They ate lunch and went to the park. The park had a jungle gym and a sandbox and was there on the apartment complex grounds [Vol. 7, RR 126-127]. At about 12:15 p.m., she saw a gray car pull up. The driver got out and walked to the breezeway and then two Hispanic men walked to the breezeway area and were arguing in Spanish [Vol. 7, RR 128]. The driver got back into his car [Vol. 7, RR 128].

She wasn't paying attention, but when she heard gunshots, she looked up. The driver had shot the guy who was standing by the driver's window [Vol. 7, RR 128]. She picked up her nephew and took off running down the sidewalk. She heard a car hit the trash can and when she turned around, she looked the driver of the gray car in the face [Vol. 7, RR 128]. The two men were arguing before the shooting, she said [Vol. 7, RR 129]. The argument was in Spanish, so she was not able to understand what the argument was about [Vol. 7, RR 130].

She could not recall a female coming up to the car [Vol. 7, RR 130]. When she heard the first and second

shots, she looked up and saw the gun out to the side. The driver was sitting in the car with a gun in his hand [Vol. 7, RR 131]. She went to her house and believed she or her parents called the police. When she looked over, she saw the victim lying on the breezeway. She saw a lady take his boots off and run to the other side of the apartments [Vol. 7, RR 137]. Ms. Keener selected photograph 30B when shown a photographic lineup on June 19, 1995 [Vol. 7, RR 142]. She viewed the six photos a week after the shooting, the alleged killing (Vol. 7, RR 148]. Ms. Keener identified State's Exhibit 57 as her statement. Her name at that time was Darlene Nicole Phipps [Vol. 7, RR 155]. Ms. Keener identified the appellant in court [Vol. 7, RR 163].

MARIA CORDOVA

Maria Lydia Cordova testified that she was the mother of the deceased. Mrs. Cordova said that shortly after she heard her son had been killed in the United States, she saw the appellant in Guatemala [Vol. 7, RR 168]. A month after her son was killed the appellant was in Guatemala acting real happy, she said [Vol 7, RR 168].

HAROLD RENFROE

Detective Harold Renfroe of the Irving Police Department testified that on June 12, 1995, he went to the crime scene at 2646 West Grauwyler in Irving, Texas [Vol. 7, RR 171]. Once there, he contacted patrol officers and the victim's sister, Luz Del Cid [Vol. 7, RR 171]. The apartment manager interpreted when he spoke to Ms. Del Cid, Ms. Del Cid told him that the appellant, Rafael Arriaza Gonzalez, shot her brother [Vol. 7, RR 172]. Detective Renfroe said he was told that there were three people and two cars at

the scene. Other names he got at that time were Albino Chivarerra and Rigoberto Ramirez [Vol. 7, RR 173]. Ms. Del Cid admitting taking money from her brother's boot. He seized the money from her apartment and placed it into the property room. Detective Renfroe said that the amount of money was approximately $1,500 [Vol. 7, RR 174].

Detective Renfroe showed separate photograph lineups to Luz Del Cid and Darlene Nicole Phipps. Both picked out the appellant from the photo lineups [Vol. 7, RR 177]. Each said that that was the person they saw shoot the complainant [Vol. 7, RR 178]. Detective Renfroe testified that at some point he learned that the appellant was in Guatemala. He contacted the America Embassy in Guatemala and talked to them about the case and faxed them a copy of the warrant affidavit and a copy of the report [Vol. 7, RR 186-187]. He had no specific address for them to go look for the appellant, just a village in Guatemala [Vol. 7, RR 187]. Detective Renfroe said that following the killing, he learned that another Hispanic man was at the crime scene; a man named Cordova was at the crime scene [Vol. 7, RR 189]. Ms. Luz Del Cid told Detective Renfroe that she took off one boot, saw money in it and put it in her pocket. Before she could get the other one off, Martin grabbed that one and they left [Vol. 7, RR 190-191]. The police took $1,569.00 from her [Vol. 7, RR 191].

VICKIE BURGE

Vickie Burge, a deputy with the United States Marshal Service, transported the appellant in July 2004 from Guatemala to the United States [Vol. 8, RR 7-8]. She went to Guatemala with Deputy U.S. Marshal Mark Walker [Vol. 8, RR 8]. The

appellant was brought back in an extradition proceeding [Vol. 8, RR 8]. Ms. Burge said that they first went to the U.S. Embassy in Guatemala on July 7, 2004 and picked up the appellant on July 28, 2004 [Vol. 8, RR 9]. The appellant was brought to the marshal's pursuant to their federal extradition paperwork [Vol. 8, RR 10]. The marshals flew the appellant into Houston and then to the Lew Sterrett jail in Dallas County, Texas [Vol. 8, RR 12].

DAVID WALKER SPENCE

David Walker Spence, a trace evidence supervisor of the Trace Evidence Section of the Southwest Institute of Forensic Sciences, testified that lead residue pattern on the shirt of the deceased was consistent with a shot being fired from six inches to about a foot and a half away [Vol. 8, RR 26].

JONI MCCLAIN, M.D.

Joni McClain, Chief Medical Examiner for Dallas County, testified that Dr. Juan Zamora performed an autopsy on the complainant (State's Exhibit 42) [Vol. 8, RR 38]. The autopsy performed on June 13, 1995, showed that the complainant, Robert Valesquez, was shot four times. One of the bullets went through his heart, both lungs, and aorta [Vol. 8, RR 41-44].

The appellant elected to remain silent and called no witnesses [Vol. 8, RR 5-51].

POINT OF ERROR NO. ONE RESTATED

THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

SUMMARY OF THE ARGUMENT

The indictment alleges that the appellant murdered Roberto Valesquez on June 12, 1995 [R 2]. The re-indictment was filed on May 25, 2001] [R 3][1]. Following the alleged murder of Roberto Valesquez, the complainant's mother reportedly saw the appellant in Guatemala. However, there was no evidence to suggest that the appellant had knowledge of any legal proceedings or arrest procedures prior to departing to his native country.

The trial court conducted a series of hearings on the appellant's motion contending his right to a speedy trial had been violated. The trial court noted that the jury trial proceeding was scheduled two and a half months short of ten years after the alleged murder on July 12, 1995 (Hearing of March 25, 2005).

Much of the speedy trial hearing focused upon the actions taken by Assistant District Attorney Jeff Shaw. Although the appellant had been indicted on July 15, 1995, Mr. Shaw, the chief contact for extraditions, had no contact with the case prior to 2001 (Hearing of March 31, 2005 [R 6]. Assuming arguendo that Mr. Shaw competently exercised all the powers within his command to have the appellant arrested and extradited from Guatemala. There remains a six-year period of inaction by the District Attorneys and law enforcement agencies. Dallas County Sheriff James De Capua, of the Warrants Execution Division testified that there was

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[1] Assistant District Attorney Jeff Shaw testified that the appellant was originally indicted on July 18, 1995 for the offense of murder (Hearing of March 3, 2005).

no record that lead detective Harold Renfroe ever contacted the Dallas County Sheriff's office to let them know that the appellant was in Guatemala (Hearing of March 31, 2005). Officer De Capua acknowledged that they would have taken steps had they known that the appellant was in Guatemala [RR 26-28].

Officer De Capua summarized what he considered to be the five "occurrence dates" from the date of the alleged killing (June 2, 1995) until March 25, 2005, the hearing date.

1. On July 26, 1995, case information was entered into TCIC and NCIC [RR 29].
2. On August 10, 1995, police went to arrest the appellant at 110 N. Jupiter, Apartment 115, Dallas, Texas [RR 29].
3. On April 16, 1997, the appellant's name was run through Faces of the Nation or AUOTRACK [RR 22, 30].
4. On March 30, 2001, the Dallas County Sheriff's Department received information that the appellant was in Guatemala [RR 25, 30].
5. On June 6, 2001, an attempt was again made to arrest the appellant at the original location (110 N. Jupiter, Apartment 115, Dallas, Texas).[2]

After March 30, 2001, the Dallas Sheriff's Office relayed (the information) to Assistant District Attorney Jeff Shaw. Sheriff De Capua said he "guessed that" Mr. Shaw got a provisional warrant to

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[2] Detective Renfroe of the Irving Police Department learned that the appellant was in Guatemala in August 1995, some five years earlier.

extradite the appellant from Guatemala [RR 23]. Detective Harold Renfroe filed a murder case against the appellant on June 28, 1995, and put out a warrant for his arrest [RR 58]. The warrant was issued 16 days after the murder [RR 59]. Information was put out on NCIC so that the appellant would be stopped anywhere on the roads of the United States [RR 59]. Detective Renfroe put the case on the computer of the Dallas County Sheriff's Office [RR 60]. He had been told by the sister of the deceased, Luz Del Cid, that the appellant had committed the crime [RR 55].

However, in August 1995, Detective Renfroe was told by Luz Del Cid that the appellant had been seen in Guatemala. Renfroe called the American Embassy in Guatemala and told a man named Lance Ruth that the arrest warrant had been issued in the United States [RR 60]. Renfroe said he learned that the appellant was in a small village with no mailboxes [RR 61-62]. Renfroe contacted the U.S. Embassy in Guatemala on March 6, 1996, and also contacted the State Department in Dallas [RR 62]. However, between March 6, 1996 and March 30, 2001, Detective Renfroe did not do anything further because the case had been filed with the District Attorney's office and the appellant was out of the country [RR 63]. After March 1996, Detective Renfroe made no further phone calls [RR 63-64]. The contacts he had made with Guatemala were by phone and by fax [RR 64].

After 1996, the case went unmonitored, with the assumption that the appellant would eventually be arrested in Guatemala [RR 69].

ARGUMENT

The fact that Assistant District Attorney Jeff Shaw was able to extradite the appellant from Guatemala after receiving the case in 2001, shows that the appellant could have been apprehended and brought to the United States sooner. The lack of effective communication between the Irving Police Department and the Dallas county Sheriff's Office resulted in a complete cessation of action between March 1996 and 2001. Mr. Shaw successfully extradited the appellant from Guatemala to the United States. United States's marshal Vickie Burge finally transported the appellant from Guatemala in 2004 [Vol. 8, RR 7-8].

Defense counsel established that even after the appellant awaited trial in the Dallas County jail, there was further delay. The prosecution tried a different person on the date of the appellant's jury trial, causing him to wait even longer.

Although Assistant District Attorney Shaw performed his extradition task efficiently, he acknowledged on cross-examination that had he been familiar with Interpol procedures and resources, he might have employed them.

Even though testimony of two eyewitnesses is strong enough to effectively foreclose an attack upon the sufficiency of the evidence, there were at least three other persons present in two cars at the scene of the alleged murder. Rigoberto Ramirez and Albino Chivarerra were in a separate car at the alleged murder scene. A man named Martin Cordoba was with the appellant and apparently removed evidence from the deceased's boot [Vol. 7, RR 72, 73].

Defense counsel effectively raised questions about the possible motive and circumstances surrounding the killing. The boot of the deceased was removed as he lay mortally wounded. Defense counsel was able to show that Ms. Del Cid took some of the money out of the boot, which she later turned over to the police. The defense raised questions about whether there may have been drugs and a gun in the boot of the deceased but was unable to do so. Had a timely investigation been conducted by the defense, the avenue of inquiry regarding drug trafficking might well have been established.

Following the shooting, Luz Del Cid tried to grab and detain Albino Chivarerra, who drove away from the shooting scene thwarting her efforts.

Simply put, the appellant was not the only suspect in the shooting. As previously noted, there was no evidence that the appellant was aware of any arrest warrant having been filed against him.

> "Relevant factors in determining whether a delay in bringing the defendant to trial violated the constitution include the length of the delay, the defendant's assertion of the right to a speedy trial, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2183, 33 L.Ed. 101 (1972).
>
> "A defendant who had been indicted in May 1988 on charges of aggravated sexual abuse and who was arrested and brought to trial over six years later moved to dismiss based on the violation of his constitutional speedy trial rights.

> After his motion was denied, the defendant was convicted of aggravated sexual assault. The Court of Appeals, Federico G. Hinajosa, Jr., held that (1) delay of over six years was presumptively unreasonable and prejudicial; (2) the defendant's assertions of his right at trial was timely as there was no evidence that the defendant was aware of the indictment prior to his arrest; and (3) the defendant's speedy trial rights had been violated as the State did not establish an excuse for delay or controvert the presumption of prejudice." *Pierce v. State*, 921 S.W.2d 291 (Tex.App. – Corpus Christi, 1996).

In dismissing, the Corpus Christi Court of Appeals relied upon the *Barker v. Wingo* (supra) test. *Pierce v. State*, (supra) at 293, 294.

In *Pierce*, as in the present case, there was a delay in arresting the defendant. The Court of Appeals summarized its findings on the reasons for delay previously noted. There was no evidence that the appellant was aware of any arrest warrant having been filed against him.

> "It is the State's burden to establish an excuse for the delay. *Empak*, 889 S.W.2d at 624; *State v. Hernandez*, 830 S.W.2d 631, 634 (Tex.App. – San Antonio 1992, no pet.). The State's negligence, however innocent, militates against the State. *Empak*, 889 S.W.2d at 624; *Branscum v. State*, 750 S.W.2d

892, 895 (Tex.App. – Amarillo 1988, no pet.).

"Appellant moved to Houston shortly after the assault, leaving no forwarding address. The State, however, had an address for appellant's stepfather in Houston. On June 2, 1988, Nueces County issued and forwarded to Harris County an arrest warrant listing the stepfather's address as appellant's residence. At the same time, the warrant was entered into county, state (Texas Criminal Information Center), and national (National Crime Information Center) computers. Testimony from Lucy Reyes, custodian of records from the Warrants Division of the Nueces County Sheriff's Office, indicated that there was no recorded attempt to serve the warrant at the Houston address. However, the State did mail a scheduling or arraignment sheet to appellant at the stepfather's address on June 8, 1988.

"Appellant testified that he resided at his stepfather's address on the date the warrant was issued and on the date the scheduling sheet was mailed. He further testified that he had no knowledge of the scheduling sheet and that no one ever approached him or his parents attempting to serve the arrest warrant.

> "The uncontroverted testimony shows that appellant used his real name, social security number, and birth date at all times while residing in Houston. Appellant was stopped by Houston police for traffic violations on two separate occasions after the warrant was issued and listed in the TCIC and NCIC computers. After appellant failed to pay one of the tickets, a police officer contacted him and told him that a warrant would be issued for his arrest if he did not pay the ticket. In 1992, appellant renewed his driver's license with no difficulty. Finally, in June 1994, appellant was arrested when he again went to renew his driver's license.
>
> "The State could not explain why Harris County failed to serve the arrest warrant after it was issued on June 2, 1988. Other than listing the arrest warrant in the TCIC and NCIC computers and mailing the scheduling or arraignment sheet, there is no indication in the record that Nueces County looked for appellant. Because the State failed to establish a excuse for the delay, we conclude that this factor favors appellant." *Pierce v. State*, 921 S.W.2d 291 (Tex.App. – Corpus Christi 1996).

In the present case, the appellant fought extradition in Guatemala. But, as indicated

previously, six years had already elapsed prior to the Dallas County District Attorney's office receiving information that the appellant was in Guatemala.

There was no evidence that the appellant tried to alter his identity. Defense counsel offered into evidence Defense Exhibit 11, the appellant's passport, containing his name, date of birth, and a page stamped by the U.S. American Embassy in Guatemala.

> "*Barker* was modified with respect to the prejudice factor by *Doggett* which provided that, under certain fact situations, the State's egregious persistence in failing to prosecute the defendant was sufficient to warrant relief even without a showing of actual prejudice. 505 U.S. at 655, 112 S.Ct. at 2693; *Traylor v. State*, 892 S.W.2d 447, 449 (Tex.App. – Beaumont 1995, pet. Ref'd). *Barker* and *Doggett* recognize that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown. *Doggett*, 505 U.S. at 655-56, 112 S.Ct. at 2693; *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193; *Traylor* 892 S.W.2d at 450. *Doggett* further recognizes that when proof of specific prejudice is absent, presumptive prejudice may, in proper combination with the other *Barker* factors, carry a defendant's Sixth Amendment claim, *Doggett* 505 U.S. at

655, 112 S.Ct. At 2693; Traylor, 892 S.W.2d at 450. Courts have generally found post-accusation delay presumptively prejudicial at least as it approaches one year. *Doggett*, 505 U.S. at 652 n. 1, 112 S.Ct. at 2691 n. 1. When the government's negligence causes delay and when presumed prejudice is uncontroverted, the defendant should be afforded relief on speedy trial grounds. *Doggett*, 505 U.S. at 655, 112 S.Ct. at 2693.

"Because the post-accusation delay in this case exceeds six years, and the delay was caused by the State's negligence in bringing appellant to trial, we conclude that the State must overcome a presumption of prejudice. Although the State contends that appellant did not provide evidence of actual prejudice, we find that appellant did not have such a burden in this case because of the protractedness of the delay and the State's negligence. *See Id.*" *Pierce v. State*, (supra) at 295-296.

The trial court overruled the appellant's motion for dismissal because of the speedy trial violation (Hearing of April 22, 2005).

In sum, the appellant contends that the trial court erred. When defense counsel was appointed on July 2, 2004, any opportunity for a meaningful investigation was gone.

Because his right to a speedy trial was violated, the appellant prays for dismissal.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant urges this Honorable Court to review the points of error presented and to determine whether or not reversal of this cause is required. If the Court finds that the points of error presented do justify reversal, the Appellant would move that such reversal of the conviction be granted. The Appellant prays that this cause be reversed and remanded, or alternatively, that an acquittal be entered.

Respectfully submitted,

/s/ Russ Henrichs
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ATTORNEY FOR APPELLANT

APPENDIX Q-4

REPORTER'S RECORD[3]
(VOLUME TWO OF VOLUMES)
CAUSE NO. F01-01091-R
HEARING ON MOTION FOR SPEED TRIAL
March 25, 2005

Page 3

P R O C E E D I N G S

(OPEN COURT, DEFENDANT PRESENT.)

THE COURT: This is Cause No. F01-01091, State of Texas versus Rafael Gonzales. The purpose of this hearing is to determine whether there's been a violation of the constitutional right to a speedy trial. The offense is alleged to have 235ece committed on June the 12th, 1995.. Since that is three months short of – actually two and a half months short of ten years, I think the burden is on the State to show that the speedy trial was complied with. So State, you have evidence to present at this time?

MS. WILBANKS: Yes, Your Honor, would you like to swear in all the witnesses now?

THE COURT: Yes. Please.

(ALL WITNESSES PRESENT SWORN BY COURT.)

THE COURT: Who'll he your first witness?

MS. WILBANKS: Luz Del Cid.

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[3] Line numbers omitted throughout.

MR. MONTALVO: Your Honor, we'd like to invoke the Rule at this time.

THE COURT: Okay.

Page 5

A Yes.

Q Where were you in relation to your brother at the time?

MR. MONTALVO: Your Honor, I'm going to object. It's going outside the scope of this hearing. I thought she was only going to testify to due diligence involved in the case.

MS. WILBANKS: She is – may I respond?

THE COURT: What do you expect to bring out at this point+

MS. WILBANKS: That she was right there and she got a good look at the defendant in order to give the detective a starting point for looking for him.

THE COURT: I'll allow that part.

Q (By Ms. Wilbanks) Ma'am, how close were you to your brother – I mean distance-wise – at the time that he was shot?

A. I don't remember, but six or fifteen feet.

Q. Okay, did ypu see the person that shot your brother?

A. yes.

Q Do you know him?

Q Yes.

Q Who was it?

A The one that is seated right here, Rafael.

Q What's Rafael's last name?

A Gonzales.

CROSS EXAMINATION

Page 8

Line 17 BY MR. MONTALVO:

Q Ma'am, the information that you had in 1995, who else did you pass it on to?

A Nobody else,

Q Okay, At the time of the murder, June 12th, 1995, you provided that information to Detective Renfroe, correct?

A Yes

Q the information that you just said here in court, the town – go ahead.

Page 11

Q (By Mr. Montalvo) And that department – I don't remember if I asked you this or not – it's not densely populated, correct?

A No.

THE COURT: I don't understand the answer. It is easy to find someone or it is not easy to find someone?

A It is easy.

THE COURT: Okay.

Q (By Mr. Montalvo) And again, this is the information that you provided Detective Renfroe the same day of the alleged murder, correct?

A Yes.

Q and Guatemala is a poor country but it has telephones and FAXes. Correct?

A Yes, all of that.

NEXT PAGE

page 12

Q And when you were speaking with Detective Renfroe, he understood what you were saying and you understood what he was saying, correct?

A We understood each other, but we had an interpreter.

Q So .you had someone there that spoke Spanish and English, correct?

A yes.

Q And that was just to make sure that everything was clear, correct?

A Yes.

Q And that's where you provided the information that Rafael Gonzales was spotted in Guatemala, correct?

A Yes.

REDIRECT EXAMINATION

BY MS. WILBANKS:

Page 15

Line 13

Q Ms. DelCid, you said earlier that you had heard through some friends that the defendant was here in the States. When was that?

A Before he fled to Guatemala.

Q So sometime between June 12th, 1995, the day that your brother was killed, and August-September 1995 when your mom spotted hin down there?

A Yes.

MS. WILBANKS: State passes the witness.

DIRECT EXAMINATION

Page 16 line 21 (BY MS. WILBANKS:

Q Good morning, Officer, Can you please state your name and spell your name for the record?

A James DeCapua. (Spelling) D-e-C-a-p-u-a.

Q Officer DeCapua, how are yo employed?

A I work for the Dallas County Sheriff's Department in

NEXT PAGE 17

Line 1

the Warrant Execution Section.

PAGE 18

line 6

A . And did the employee or representative who made the entries on the computer have actual knowledge of the event?

A Yes.

Q And here – we're here today to talk about specifically a defendant by the name of Rafael Arriaza Gonzales?

A Yes, ma'am,

Q And those are the records I asked you to look at?

A Yes, Ma'am , it is.

CROSS EXAMINATION

BY MONTALVO

Page 26 line 7

A Yes, it's the same address.

Q -- as on Exhibit 1, correct?

A Yes, sir. Yes, sir.

Q Which was – would say it's on out to August 10th of '95, correct?

A Yes, sir.

Q And I guess those are all the records that you have?

A Yes, sir, it is.

Q Okay. And there's no record that Detective Renfroe ever contacted the Dallas Sheriff's Office to let them know of the possibility he may be in Guatemala, correct?

A I'm sorry?

Q There's no record that Detective Renfroe ever contacted the Dallas Sheriff's Office to let them know he may be in Guatemala, correct?

A Yes, sir, there is no record that I could find.

Q And in fact on the WRWI, I guess there's a first page; is that correct?

CONTINUING RELEVANT PAGES..begins page 28 line 10

Q And on State's Exhibit 1, there is no information that the defendant may have – may be a fugitive or may have gone off to Guatemala, correct?

A No, sir.

PAGE 29 line 14

Q And that you know of, no one in the Dallas Sheriff's office ever kept up with this?

A As far as I know, yes, sir.

Q Yes, they did or yes, they did not keep up with it?

A No, they did not keep up with it except for making the notations that - -

PAGE 31 line 19

Q They could – I guess get in touch with some authorities in the country where – if they had specific information, correct? Like the U.S. Embassy?

A Yes, sir.

Q But none of that was done in this case, correct?

A Not that I see that's been noted, no, sir.

Q Okay.

REPORTER'S RECORD
(VOLUME 3 of VOLUMES)
TRIAL COURT CAUSE NO. F01-01091-R
HEARING ON SPEEDY TRIAL MOTION
March 31, 2005

(Cross-examination Mr. Jeff Shaw Chief DA Investigator contact FBI, U.S. Embassies).

Page 17 line 3 CROSS-EXAMINATION

By Mr. Montalvo:

Q Mr. Shaw, you said that once the extradition started, its' basically in Guatemala's hands; is that correct?

A Well, once the papers get down there, there is not much we can do to push it except for just through the Office of International Affairs, which is what they did, yes.

Q Okay. Now, I guess to establish first, the U.S. and Guatemala do have a treaty; is that correct?

A They do.

Q And at that time, did you, whenever you received information that there was a defendant in the Guatemalan jail and the extradition would be at issue, did anyone at the DA's office try to look up that treaty?

A I don't know that they did, no.

Q Okay. Were you aware that, under that treaty, the United States has forty days to send their documents down there?

A That's probably right. Usually it's sixty, but that would be about right,

MR. NONTALVO: May I approach the witness, your Honor?

THE COURT: Yes.

Q I'll show you what's been marked as State's Exhibit

NEXT PAGE 18 line 1

C. It's entitled the Treaty for the Mutual extradition Fugitives from Justice; is that correct?

A Yes.

Q is it the 33 stat 2147 and I guess at a supplementary convention and it's also a 55 stat 1097, correct?

A Yes.

Q And I guess on page six of the treaty under article 9, I've highlighted an area there.

A Not exceeding forty days to await the production of the documents upon which the claim for extradition is founded.

A So, no one at the DA's office looked up that treaty, correct?

A I don't believe they did.

CONTINUING RELEVANT INFO ON OAGE linel

Q And you said you have been doing this 31 years, correct?

Q that's it, 25?

A twenty-five.

Q And I guess you would consider yourself reasonably knowledgeable in this area.

A Pretty much.

Page 51 line8

Q I guess you're not aware of any federal law that would allow for a warrant to be sent from the Secretary of State to a foreign country.

A I don't know anything about that, I'm sorry.

Q And you wouldn't know the purpose of Interpol is to transfer information.

A I understand that' – I think that's what they do, yes. We have just never had any contact with Interpol in our office.

Q Okay. And you have never heard of anyone being arrested based on Interpol's information±

A No, sir, I haven't.

Q Show you State's Exhibit F. something that came from the Interpol website. I guess down here it says www.interpol.

A Yes,

Q And it has different notices. What is an international notice, correct?

A Yes, sir, uh-huh.

NEXT CONTINUING PAGE 52 (cross-examination by Montalvo, defense counsel).

Q And it says its most important fuction is to help police in member countries communicate critical crime related information to one another, correct±

A Yes.

Q And the information exchanged concerns persons who are wanted for committing serious crimes.

A Yes, sir.

Q Now, here I guess it's six types of notice, correct±

A Yes, sir.

Q And one of these is a red notice.

A yes, sir.

Q And under red notice it says, it's used to seek the arrest with a view toward -- a view to extradition of subjects wanted and based upon an arrest warrant.

A Yes, sir.

Q So it's possible to issue some sort of notice to a foreign country that somebody, that we want their arrest, we want the body to be brought back, without them being in jail.

A Yes, sir.

Q At least based on what you've read here.

A Yes, sir.

Q On Interpol, correct?

Page 54

HAROLD RENFROE,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. WILBANKS:

Q Good morning, Detective Renfroe. Can you please state your name and (spell your name for the record?-

A Harold Renfroe, and it r-e-n-f-r-o-e.

Q Detective Renfroe, how are you employed?

A I'm a police officer for the City of Irving.

Q How long have you been so employed?

A Twenty-four years.

Q Are you a detective in the homicide and robbery division of the Irving Police Department?

A Yes.

Q And on June 12th 1995 were you assigned a case to investigate the death of Roberto Velasquez?

A Yes.

Q On that date did go out to the scene of the crime?

A Yes, I did..

(CROSS-EXAMINATION OF DETECTIVE RENFROE) page 59 line 19

A Yes.

Q During you search for the defendant, did you find that he had other identities?

A Yes.

Q did you follow up on the addresses for those IDs?

A No, I didn't.

Q Did I call any other apartment complexes that the

CONTINUING NEXT PAGE 60 line 1

defendant might have lived at other than this one on Jupiter+

A No.

Page 67 line 12

Q And with whom did you speak at the U.S. Embassy?

A That was Lance Ruth (ph).

Q Is that that in your notes as well?

A I believe so.

Q Or did you have to look that up?

A I believe it's in there.

Q And you believe or did you look over your file?

A Yeah, somewhat, yes.

Q And that would be the first time and the second time?

A Yes.

Q Now, what, if any, action did they take as a result of that –

A I have no –

Q -- or do you know?

CONTINUES NEXT PAGE 68 line 1

A I don't know.

Q You never followed up with them?

A No.

Q Did you ever consider Interpol?

A No.

Q And why is that? You're familiar with Interpol, correct?

A Sure.

Q And what do .you understand them – what do you understand them to do?

A To track out of country suspects, I believe.

Q And you don't know if they have to be under arrest or not, do you?

A No.

Q And at that time, I mean you were aware of Interpol, correct?

A Yes.

Q And it's just something that you chose not do so?

A I just didn't do it.

Q And you never contacted any other federal authorities other than the State Department or the Guatemalan Embassy, correct?

A That's true.

Q Did you ever speak with anybody else as to how you would apprehend a defendant in a foreign country?

CONTINUES NEXT PAGE ....

CONTINUING FROM PAGE 68.....

A No.

Q Did you ever contact anyone I guess regarding any procedures you would have to take?

A No.

Q You just had that one fax and one phone call.

A Yes, sir.

Q And then after that, in '96, it went unmonitored, correct?

A Yes.

RELEVANT CONTINUEING INFORMATION ON PAGE 74 line 10

A Be a matter of making a phone call down there, You called down there, correct?

A Yes.

Q Did you ever attempt to contact any of the Guatemalan authorities?

A No.

Q The state police, the local police?

A No, sir.

Q The Guatemalan department in charge of Interpol?

A No.

CONTINUING INFORMATION ON PAGE 75 line 10

A Yes.

Q So how long would you say that you looked for the defendant?

A A couple of weeks, something like that.

Q And you knew what village he live in, correct?

A I had obtained that information at one time, yes.

Q And you knew he had been spotted in that village, correct?

A Yes.

And you determined that information to be – you determined that information to be reliable, correct?

A I thought so.

Q Did you ever call the sister of the victim back?

A Luz Delcid?

Q Yes.

A I talked to her off and on.

Q Did you ever attempt to follow up to see if anyone had taken any action on the information you provided through her?

A No.

REPORTER'S RECORD
(VOLUME FOUR OF VOLUMES)
CAUSE NO. F01-01091-R
April 22, 2005
(HEARING ON MOTION FOR SPEEDY TRIAL
(CONTINUED)

PROCEEDINGS (OPEN COURT, DEFENDANT PRESENT.) Page 3 line 3

THE COURT: All right, these are two cases, State of Texas versus Rafael Gonzales – actually one case. One's a reindictment We are currently in a speedy trial hearing. The State has rested, as I recall.

MS. WILBANKS: Yes, Your Honor, but we'd like to briefly re-open.

THE COURT: Yes, ma'am.

(DISCUSSION OFF THE RECORD.)

MS. WILBANKS: I'm sorry, Judge.

THE COURT: Okay.

MS. WILBANKS: We were going to re-open.

THE COURT: But not now?

MS. WILBANKS: Yes.

THE COURT: You are or are not?

MS. WILBANKS: did you give me permission to re-open?

THE COURT: Yes.

MS. WILBANKS: I got side-tracked.

THE COURT: Yes.

MS. WILBANKS: We would ask that the Court take judicial notice of the entire contents of the Court's file. And we would also ask that the

Court take judicial notice of the fact that this Court was in trial own December 7th, 2004,

NEXT AGE 4 line 1

on a murder case where the defendant had been in jail longer than Mr. Gonzales –or it was specially set. For some reason that case was in front of this one.

THE COURT: Okay. All right.

MS. WILBANKS: And at this point we'd like record to reflect that prior to this trial, my recollection of a conversation between me and the defense attorney was that I told him I didn't think I was going to be ready on the case. I told him I wasn't going to be ready on the case, that we were going to be in trial on the Latham matter which I I previously referred to. And the defense –I thought that he said to me, but now he doesn't want to stipulate, that he was not going to be ready either.

THE COURT: Well, I can't take judicial notice of –

REPORTER'S RECORD
(VOLUME FIVE OF VOLUMES)
CAUSE NO. F01-01091-R
(HEARING ON MOTION FOR SPEEDY TRIAL
(CONTINUED)
May 13th 2005

PROCEEDINGS (OPEN COURT, DEFENDANT PRESENT.) Page 3 line 17

THE COURT: Okay. Having reviewed the evidence – having heard the evidence in the case, the arguments in the case, having reviewed the law in this case, and the – everything submitted to the Court, looking at the totality of the circumstance, I will deny the motion.

MR. MONTALVO: Your Honor, at this time please note defense objections to your ruling on the motion.

THE COURT: Yes, sir.

MR. MONTALVO: Thank you.

REPORTER'S RECORD
VOLUME 6 of 10
TRIAL COURT CAUSE NO F01-01091
JURY VOIR DIRE
GUILT/INNOCENCE
July 11th 2005

PROCEEDINGS [Defendant present; venire panel not present] Page 9 line 25

True Bill of Indictment. In the name and CONTINUES ON NEXT FOLLOWING PAGE 10 line 1

by the authority of the State of Texas, the grand Jury of Dallas County, state of Texas, duly organized at the January term, A.D., of 2001 of the 283rd Judicial District Court, Dallas County, in said court at said term, do present I, one, Rafael Arriaza Gonzales – Sir, is that your true and correct name?

THE DEFENDANT: [through interpreter] Rafael Gonzales Arriaza.

MS. WILBANKS: -- the defendant, on or about the 12th day of June, 1995, in the County of Dallas in said state, did unlawfully then and there knokwingly and intentionally cuase the death of Roberto Alcides Velasquez, an individual, by shooting Roberto Alcides Velasquez with a firearm, a deadly weapon. Against the peace and dignity of the State. Signed Bill Hill, Criminal District Attorney of Dallas County, Texas, and the foreperson, of the Grand Jury.

THE COURT: Sir, your true name is?

THE DEFENDANT: [Through interpreter] Rafael Gonzalez Arriaza.

VOIR DIRE EXAMINATION IN JURY SELECTION
Page 14 line 1

dire, or at any time during the course of the trial, it is not evidence. It is merely their opinion of what they believe the evidence to be.

The only evidence that you will consider, if you're one of the twelve jurors selected, is that what you hear from the witness stand after a witness has been placed under oath, or from any exhibits that may be admitted during the course of the trial.

THE STATE'S OPENING STATEMENT
(RR Vol. 6 of Vol 10 Page 199-203)

MS. WILBAMKS: May it please the Court. Counsel. Ladies and gentlemen of the jury, this is a case about a cold-blooded murder. It's a case about one friend who shot another in cold blood. We expect the evidence to show you that the defendant Rafael Gonzales, and the victim, Roberto Velasquez, were friends. The Defendant, Rafael Gonzales, and the victim, Roberto Velasquez, and his family all grew up with in the same small village in Guatemala. In the late 1980s and early 1990s, the Defendant, Roberto Velasquez, and some of Roberto Velasquez's siblings moved to the U.S. One by one. All ended up in the Dallas metroplex with Luz Del Cid, the victim' sister ended up living in an apartment in Irving, Texas. And that's where this crime takes place.

On June 11th, 1995, we expect the evidence to show that the Defendant, Rafael Gonzales, went over to Irving to his sister's apartment to look for the victim, Roberto Velasquez. He wasn't there; he had just left. The next day, on June 12th, 1995, the Defendant continued to search for Roberto Velasquez. We expect the evidence to show that sometime between the hours of 10:00 and noon on June 12th, 1995, the victim's sister, Luz Del Cid, was out running errands. She went to a furniture store and to a McDonald's. And while she was at both places, she saw the Defendant drive by twice. When she got back to her apartment complex, the defendant was sitting there in his car in the parking lot of the apartment complex. Now, Ms. Del Cid had known the defendant for years. So, she decided to go over and talk to him. And about the same that she arrived at the driver's

side door of his car to speak with him, her brother also walked up. We expect the evidence to show that the defendant Rafael Gonzales, was the only person sitting inside of that car. Roberto and Rafael began a conversation. Roberto was telling Rafael how he was going to go back to Guatemala, probably for a short trip. And he asked the Defendant if there was anything that he wanted him to bring back from Guatemala for him. The defendant answered him by saying, "I'm going to send you back to Guatemala in a body bag." That's when the defendant reached under his leg, pulled out a gun, pointed it at the victim, and shot him. The impact of the shots caused Roberto Velasquez to fall against his sister. The defendant backed up his car, and then peeled out of the parking lot. Obviously, Ms. Del Cid was in shock. She doesn't remember exactly what happened to her brother right then, but she ran over to another car where the Defendant's friends were. She grabbed the collar of the driver, the collar of the shirt of the driver, and shook him demanding to know why her brother had been shot. Albino Chivarerra decided to do what probably anybody would do. He started driving the car away so that Luz would have to let go of him. And she did. When she let go of him, she looked around to see her brother lying in the breezeway of the apartment complex with several people around him. At least two men were trying to administer CPR to save his life when she arrived at his side. Scott Hughes and Jarrett Bobbitt were trying to administer the aid. Scott Hughes had heard the shots and looked out his bedroom window or the window of his apartment, and he saw the victim walking across the courtyard toward his breezeway. He ran to his front door and opened up the door to

see the victim there in his breezeway. Scott Hughes had just-started a job and he had just learned CPR, so he decided to try to help. When Jarrrett Bobbit showed up at the same, he sent Jarrett in to get some towels to try to stop the bleeding. They tried very hard just save the victim's life, but their efforts were futile. You see, the Defendant had shot the victim four times, once in the face, once in the chest, once in the shoulder, and once in the back. After he was shot, he had seconds to minutes to live. No matter who was there trying to help him, he would not have lived. The paramedics arrived shortly thereafter. They worked on him for a few minutes, and then transported him to Parkland Hospital where he was pronounced dead. And that's why we're here. We're here because Roberto Velasquez was shot in cold blood.

CROSS EXAMINATION OF HECTOR ADELSO RAMIREZ VICTIM'S BROTHER (Defense Montalvo)

Page 214 line 14

Q Well, isn't it, in fact, true that you – not only did you tell him that you hadn't seen your brother, but you had told them that he always had money and you asked him where he was getting it, correct?

A That's true.

Q And you also told the detective that your brother always carried a gun.

A Yes.

Q And you had had a car stolen from you the prior Saturday, correct?

A Yes.

Q Did your brother also have a pager?

CONTINUES ON NEXT PAGE 215 line 1

A I don't remember.

Q You also told the detective that, as far as you knew, your brother wasn't involved with drugs, correct?

A with drugs? No.

Q Were you told anything – well, I'm sorry, I'll start over.

Do you know his roommate at the time?

THE INTERPRETER: Interpret of roommate?

MR. MONTALVO roommate.

A No. No, I didn't know him.

Q [By Mr. Montalvo] It wasn't a man named Martin Guzman Cordova?

A I don't know a Martin Guzman Cordova.

Q Your brother wasn't living with you, correct?

A No, my brother did not live with me.

Q And he wasn't living with your sister, correct?

A No.

REDIRECT EXAMINATION BY MS. WILBANKS: PAGE 216 line 13

BY MS. WILBANKS:

Q Mr. Ramirez, tell the jury about the incident with your car. Was it actually stolen?

A My car disappeared around 8:00 or 9:00 in the morning, perhaps.

Q Who did it turn out had the car?

A They told me — they had called me at my home saying that the car had been taken.

Q Did you find the car?

A Never.

Q Did you find out that Roberto had actually taken it without your permission?

A He himself told me that he had taken it.

NEXT PAGE 217

Q So, he just basically borrowed it without permission but you didn't know that until you had reported it stolen?

A That's right.

MS WILBANKS: No further questions.

CONTINUING PAGE 217 LINE 6

RECROSS-EXAMINATION

BY MR. MONTALVO:

Q Didn't you tell Detective Refroe that you were on your way to report the car stolen when you were paged about your brother?

A I don't understand. Informed about my brother what?

Q Well about your brother being shot.

A That was Monday.

Q Monday after your brother was shot or the Monday before?

A After my brother had died.

Q You were on your way to report the car stolen?

A No. The car had been reported stolen Saturday, since it had been stolen.

Q So, Detective — You never told Detective Renfroe that you were on your way to report the incident to DPD when you were paged about your brother being shot.

A When my brother was killed, after Rafael killed my brother, somebody called me on my pager and they told

NEXT CONTINUEING PAGE 218 line 1

me that my brother and Rigoberto had taken my car.

MR. MONTALVO: Your honor, I'm going to object to non-responsive.

THE COURT: Overruled.

MS. WILBANKS: Mr. Ramirez, that means you can answer the question. You can finish.

A Okay. The car, they stole it Saturday. And Monday, rafael killed my brother. After Rafael killed my brother –

MR. MONTALVO: Your Honor, I'm going to object. He doesn't have any knowledge, personal knowledge of my client –

THE COURT: sustained.

Q [By Mr. Montalvo] So, go ahead.

A They called me on my pager and somebody told me, I don't know who it was, the person who called me on my pager, that Roberto and Rigoberto had stolen my car. So, they told me that Roberto and Rigoberto had used the car to rob someone. And what they robbed –

MS. WILBANKS: Objection. Non-responsive.

THE COURT: I'm sorry?

MS. WILBANKS: it's non-responsive.

THE COURT: Sustained.

(City of Irving Polic eofficer Larry Jameson Cross-Examination by Montalvo)

Page 238 linc 19

Q Were you there when the boots were removed?

A Yes, I believe I was.

Q okay. And did you see the contents of the boots?

A No.

Q Was that you or Officer Miller?

A No, it would have been me you're talking about.

NEXT CONTINUEING PAGE 239 line 1

I saw nothing in the boots.

Q You saw nothing in the boots?

Did you see the decedent's sister go back to her apartment at any time?

A I walked with her back to her apartment.

Q Was there another man that was with her?

A There was another guy that was there, and I believe, as a matter of fact, she, -- he either took the boots or she handed them to him.

Q And at that time, you never saw any contents of the boots.

A No, sir, I did not.

Q And is that the only writing that you made regarding your time at that scene?

A The supplement report, yes, sir,

CONTINUING RELEVANCY ON PAGE 241 line 1

and I.

Q But you never saw the boots being removed?

A Oh, I saw her taking the boots off. Yes sir, I did see that. And then I saw her, at some point either hand or the guy took –and I don't know who that other individual was. A man took the boots from her in the entryway of the apartment complex.

Q Did you think that odd at the time?

A Not really. I mean....

Q Well, I mean, you said you were there to preserve evidence, and then somebody's removing the decedent's boots and walking off with it, you didn't feel a need to stop them or think something was going on?

A Well if I had have, I would have. But, you know, obviously, I didn't because I did not.

Q And the decedent's sister and this gentleman that appeared, did – Was he there when you got there?

A I believe he was already there.

Q Did they seem to be communicating as if they knew each other, as if they were intimate – Not a husband and wife or boyfriend-girlfriend, but just on an intimate friendship levellike they knew each other well?

A I thouht that they may have been associated with each other. I didn't know if they ...

Q If they were friends?

NEXT PAGE 242 line 1

A Yeah. I wouldn't have any idea there. I didn't pursue that avenue.

(CROSS EXAMINATION OF DALLAS OFFICER LARRY JAMESON BY MR. MONTALVO) page 238 line 10

PAGE 238 line 10

Q And at that time, the Defendant's – I'm sorry, the decedent's sister was with him, correct?

A Yes.

Q At any time, did you see her leave his side?

A Well, as the paramedics came and started to work on her brother, she was kind of – we helped her back, and she was kind of back with me, and then she would go back to him. But, no, she did't wander from the area.

Q Were you there when the boots were removed?

A Yes, I believe I was.

Q Okay, And did you see the contents of the boots?

A No.

Q was that you or Officer Miller?

A No it would bave been me you're talking about.

NEXT PAGE 239 line 1

I saw nothing in the boots.

You saw nothing in the boots?

Did you see the decedent's sister go back to her apartment at any time?

A I walked with her back to her apartment.

Q Was there another man that was with her?

A There was another guy that was there, and I believe, as a matter of fact, she – he either took the boots or she handed them to him.

Q And at that time, you never saw any contents of the boots.

(Detective Curtis Chism) Direct Examination by Mr. Montalvo page 269 line 22

Q the color of the paint that you scraped off of the dumpster, that was red, you said, correct?

A it looked red, yes.

Q Red, burgundy, in that family?

DEFENDANT'S CLOSING ARGUMENT Page 65 line 24

DEFENDANT'S CLOSING ARGUMENT

MR. MONTALVO: May it please-the Court.

CONTINUES NEXT PAGE 66 line 1

Counsel. Ladies and gentlemen of the jury.

I thought Mr. Birmingham ended on a curious note. There's no mention of who did it. But, you know, Albino is the one that it may add up to. It doesn't make sense. It makes sense that Martin may have done it.

What you have is eyewitness of my client. You have an eyewitness identification of my client. Now, let's look at this Keener who was fair and impartial. She was shown this picture. She viewed this picture from the witness stand. She said, "That's the man I identified."

"Well, do you see him here in court today?"

Well, of course, she sees him here in court today.. That in-court identification was tainted, ladies and gentlemen. She had already seen the picture.

Now, let's go to that identification. Yesterday, we showed you these two different types of photo line-ups. One was done in that manila folder that you saw the original of, and the other one was done with these photos. I mean, just out of fairness and consistency and to make sure that your identification is not tainted, why not do them both

the same way? Why not exert an extra 20 minutes of work, or however long it

NEXT PAGE 67 line 1

would have taken, if you want to be absolutely sure that the person, the citizen you are accusing, is the person? Why create any of this later on? Why not have both of them in there? Do it the same way.

He said they had two eyewitnesses. It's not a matter of quantity; it's a matter of quality. We'll go over what Ms. Keene said later.

He went to Guatemala. He's from Guatemala. That's where he lives. They've shown no proof that he knew that there was an indictment. They've shown no proof that he had fled. They just showed proof he was there.

Then you have a pssport, and you can look at the issue date. In 2000, Detective Renfroe let the Guatemala authorities know within, what, three, four months after it happened. He's getting a passport. And if you're wondering about the Guatemala authorities, well, you know, in 2001, he was in the U.S. Embassy. Are those actions of a man that is guilty, that's fleeing, that's hiding from the U.S. authorities or the Guatemalan authorities?

REPORTER'S RECORD
VOLUME 7 of 10
TRIAL COURT CAUSE NO. F01-01091
GUILT/INNOCENCE
July 23, 2005

(DIRECT EXAMINATION OF SCOTT HUGHES By MS. WILBANKS) Page 38 line 19

Q Did you realize that what you had actually heatd was gunshots?

A Yes, ma'am.

Q How did you know that?

A There was a Mexican gentleman running up between the – on the – between the two buildings and toward my breezeway.

NEXT RELEVANT PAGE 40 line 18

Q And at some point, did a woman approach the victim in this case?

A Yes, ma'am.

Q What did she do?

A She pulled off his boots, and there was money, looked to me like drugs in his boots, possibly a gun. She shoved it all back in the boots and took the boots and took off running.

NEXT RELEVANT PAGE 41 line 1

Q Was that before or after the paramedics came?

A The paramedics were there when it happened.

Q When he was walking out there and you saw him coming toward your breezeway when you first saw him, did you see anything at all in his hands?

A No, ma'am. I don't remember. There may have been a gun, I'm not sure.

(CROSS EXAMINATION OF WITNESS SCOTT HUGHES By MONTALVO) page 46 line 14

Q You saw him get hit?

A yes.

Q And how do you know that he was hit?

A He kind of went – when the bullet hit, he kind went back, so it turned him towards my breezwway. Because he was running toward the back.

Q And you said you heard three or four shots, correct?

(CONTINUING RELEVANT PARAGRAPHS) Page 50 line 16

Q And that the paramedics arrived, correct?

A Yes, sir.

Q At some point, the boots were removed. You said that that was as the paramedics were working on him; is that correct?

A Yes, just as the paramedics had arrived and they were working on his chest.

Q Did it seem rather odd to you that somebody was taking off his boots while the paramedics were working on him?

CONTINUES ON NEXT PAGE..

(CONTINUEING FROM PAGE 50) Page 51 line 1

A Yes, it did.

Q And again, when you – when they pulled them off, you saw money?

A Money, I believe a few drugs, and the possibility a gun might have been in there.

Q You saw a metal object that resembled what you know to be a weapon, correct? A hadgun?

A Yes, sir.

Q I guess once you saw those items, did your surprise go away, or you kind of understood why?

A I kind of figured it might be a drug deal gone bad or something like that.

(DIRECT EXAMINATION OF LUZ DEL CID SISTER OF VICTIM BY MS. WILBANKS) Page 62 line 6

Q [By Ms. Wilbanks] What is the – What is Rafael Gonzales's relationship to Roberto Velasquez?

A They were friends.

Q For how long?

A For a long time.

NEXT RELEVANT PAGE 66 line

Q Describe the car that he was driving or in?

A He had a white Honda that had a black line in the back

Q Was he the only person in the car?

A Yes.

Q So, then, he was driving it?

A Yes.

Q What about the car that Rigoberto was in?

A He had a red car, but I don't know what kind, what model.

Q Was there anybody in the car with Rigoberto?

A Yes.

Q Who?

A Albino Chivarerra.

PAGE 73 line 10

Q Okay, do you know who Martin Guzman is?

A No.

Q Martin Cordova?

A Yes.

Q Was he there?

A Yes.

Q Was he also near you when you were taking off the boots?

A Yes.

Q Did he actually – Who actually picked up Roberto's boots , you or Martin?

A I don't remember.

Q Okay. What happened after you picked up the money and the necklace?

A We went to the apartment.

Q Who is "we"?

PAGE 80 line 13|

Q And then what happened?

A I let him go so that I could go back and grab Albino.

Q Where was Albino's car?

A In front of the duplex behind Rafael.

Q So, beside where – kind of in the same area where you had parked when you came in?

A Yes.

Q So, on that side, you said there was a a dumpster over there?

A Yes.

Q I'm showing you a dumpster that's in State's Exhibit No. 17. Do you recognize it? ...next page yes.

CONTINUING PAGE 71 line

Q Where is "right here"?

A Here from his neck.

Q Was he wearing a shirt?

A Yes, I grabbed him from his shirt collar.

Q What happened when you grabbed him by his shirt collar?

A He put the car in reverse, and then Rafael ran into the trash can – trash bin. And so, I let go. I threw myself away from the car. And they took off.

Q What happened next?

A And then I ran over to where my brother was.

Q Then what happened

A And my brother told me, "take off my boots because I have some money there for my mom."

Q So, what did you do?

A I took the boots off my brother. And took them and I had the money that was there, which were $2,500. And I gave it to the the police officer.

Q Did you give it to the police officer right then, or was it a little bit later that you gave it to him?

A It was a little bit afterwards when they got to the house, to the apartment.

Q When you pulled off Roberto's boots, did you see anything else fall out of his boots?

NEXT PAGE 72 line 1

A No. No, I just got the money and his chain.

Q What do you mean by "his chain"?

A My brother carried a little chain in his boot.

Q In his what?

A In his boots.

. . . . . .

A The money was inside a Ziploc bag, and I just picked up the bag.

Q So, you actually picked up the money and picked

NEXT PAGE

CROSS EXAMINATION Page 88 line 12

BY MR. MONTALVO:

Q Ms. Del Cid you gave a written statement; is that correct?

A I don't remember.

MR. MONTALVO: May I approach?

THE COURT; Sure.

Q [By Mr. Montalvo] I'll show you what has been marked as Defendant's Exhibit 2. It's a two-page; typed statement. Do you recognize your signature?

A Yes, it's my signature.

Q Do you remember now giving your statement to the Irving Police Department?

A Yes.

Q And in that statement, you had an

CONTINEIS NEXT PAGE 89 line 1

interpreter – I'm sorry, during that statement, you had an interpreter with you, correct?

A Yes.

Q And the officer reviewed the statement, went over the statement with you, correct?

A Yes.

Q And he did that before you signed it, correct?

A Yes.

Q And the last line of that statement, it says: "This statement is true and correct and to the best of my knowledge."

A Yes.

Q Now, your memory, I guess, would have been clearer at that time than it is today, correct?

A Yes.

Q And you gave that the afternoon that this incident happened, correct?

A Yes.

Q Now, in this statement, you said that when you got there, you saw some people parked, correct?

A Yes.

Q And that when you saw them parked there, you saw your brother pull in, correct?

A Yes.

Q So, you and your brother got there

CONTINUES NEXT PAGE 90 line 1

simultaneously, or at the same time, correct?

A I got there before my brother. About four or five minutes before.

Page 66 line 1

Q Describe the car that he was driving or in?

A He ahd a white Honda that had a black line in the back.

Q Was he the only person in the car?

A Yes.

Q So, then, he was driving it?

A Yes.

Q What about the car that Rigoberto was in?

A He had a red car, but I don't know what kind, what model.

Q Was there anybody in the car with Rigoberto?

A Yes.

Q Who?

A Albino Chivarerra.

Q Who are Albino Chivarerra and Rigoberto?

A Friends of Rafael.

Q So, they were all in separate cars, and while

Page 70 line 12

Q What did you do?

A I ran and grabbed them. I grabbed Albino.

Q Why did you run over there?

A Because I wanted to hold them there until the police got there.

Q What happened to Rafael?

A He left.

Q What about Roberto?

A My brother stayed there. He was laying on the floor.

Q And you ran over to Albino Chivarerra's car?

A Yes.

Q What did you do?

A I grabbed him right here [indicating].

PAGE 90 line 4

Q So, I guess if – you're going with what you said today and not what's in your statement; is that correct?

A No, that's what I said.

Q Now, with the–in terms of the boots, you had a conversation with your brother regarding the boots. Is that that you're saying here today?

A That he told me to take his boots, yes.

Q It wasn't Martin that told you to take off the boots.

A No.

Q So, you're saying that your brother was shot several times and lying there, and he was still conscious enough to talk to you to tell you about the boots?

A Yes, because he died at the hospital. And he told me that.

Q So, if in your statement you said that "Martin, at this point, told me to pull Roberto's boots off," that would be incorrect

THE INTERPRETER: I'm sorry, counsel. Would you please repeat the statement?

Q [By Mr. Montalvo] So, if you said – If your

CONTINUES NEXT PAGE 91 line 1

statement says that "Martin, at this point, told me to pull Roberto's boots off." That would be incorrect?

A I don't remember.

Q Well, you gave a statement the same day that this incident happened again, correct?

A Yes.

Q And you would agree with me that your memory would be fresher the same day of the incident than ten years later, correct?

A Yes.

Q And you said that the amount in the boots was $2500, correct?

A Yes.

Q I guess – But you didn't have an opportunity to count those – to count that money from the time you left the scene to the time you got to your apartment and gave it to the officer, correct?

A Right, I didn't count it. That's what they told me there was.

Q Who is "they"?

A I think it was Martin. I don't remember.

Q So, Martin told you to count the amount of money that was in the boots.

A Yes.

Q Now, your brother also – Or, did you

CONTINUES PAGE 92 line 1

subsequently learn that your brother also had $700 in his pocket?

A I don't remember.

Q And he didn't mention anything about the $700 in his pocket when he was telling you to take off his boots, correct?

A No.

Q Now, and isn't it true that, in the boots, there was a Ziploc bag containing a white, powdery substance?

A That's a lie. I didn't see anything.

Q Well, there were paramedics working on your brother when the boots were taken off, correct?

A They hadn't gotten there yet.

Q So, you're saying that the money was what was in a Ziploc bag; is that correct?

A Yes.

Q Was the chain handed over to the officers?

A Yes.

Q So, if there is a chain, then the officer should have that in evidence; is that correct?

A They gave it back to me.

Q Now. Your brother – You said he fell correct

A Yes.

CONTINUES NEXT PAGE 93 line 1

Q And did he get backup?

A I don't remember.

Q And I guess you don't remember because you went to the other car.

A Yes.

Q And you didn't have any fear that they had weapons, as well?

A But at that moment, I don't know. I didn't think.

PAGE 101 line 5

Q Now, after you go to the other car and then they leave, is that when you remember that your brother's been shot, or is that when you go back to where he is?

A Yes.

Q And did you see two gentlemen trying to help your brother? Or at least one.

A I don't remember.

Q Well, that gentleman that was here earlier with the ponytail, did you see him here today?

A I remember that he lived at those apartment., but at that moment, I don't remember if I saw him or not.

Q Well, he testified, and you don't know of any reason why he would have to lie about anything, correct?

A I'm sorry, what's the question?

Q He testified here today, and you don't know of any reason why he would come here and be dishonest.

A No.

Q And you don't remember him being one of the people helping your brother.

A I don't remember.

Q You do remember somebody being there, though,

CONTINUES NEXT PAGE 102 line 1

trying to help your brother.

A Yes, I think so.

Q And you remember the paramedics being there, as well, correct?

A Yes.

Q do you remember how many paramedics were there?

A No.

Q Was there just one? More than one? More than two?

A There were more, I'm not sure.

Q But they were there working on your brother's body correct?

A Yes.

Q I just want to clarify, too, these people that were parked across the way, you said they were reversing and that's when they hit the dumpster? When – I'm sorry, go ahead.

A Yes.

Q How did they end up reversing when they were parked – when they were already parked there?

A So they could go out on pioneer, following Rafael.

Q So, they were backed in, hit the dumpster? I'm sorry, I'm not clear.

A Yes.

Pae 103 line 1

Q Now, at some point, Martin ended up there, correct?

A I don't remember.

Q You don't remember Martin Cordova being there?

A No.

Q But you remember making the statement on the same day of the incident, correct?

A Yes.

Q And if you said it in your statement that day, it was probably true.

A Yes. Well, oh, Martin went in the truck with Roberto. They were together that day and then when Roberto got out of the truck and was coming, Martin was following him.

Q So, Martin was walking in front of your brother on the way to go talk to my client.

A No. Martin was behind Roberto. Roberto was the driver and Martin was the passenger.

Q So, Martin would have been a witness to this whole incident, then too.

A Yes.

Q So, if you said in your statement that, you didn't see Martin but then he just ended up there – I mean, which is a better recollection, your statement or today?

CONTINUES NEXT PAGE 104 line 1

A That Martin got there with Roberto.

Q Did you – Let me clarify then. You saw him – You're now saying that you saw him before the shooting? Martin, that is.

A Yes.

Q And getting back to the boots, if the boots would have been taken off, anyone who was around your brother would have seen you take them off, correct?

A. Yes.

Q But you say that there were no paramedics around.

A I don't remember.

Q Well, earlier you daid there were no paramedics there. So, now, you just don't – you don't remember?

A I don,t remember.

Q So, after – When you're taking off the boots, where is Martin at this point?

A I don't remember.

Q You don't remember that Martin took the boots from you?

A No.

Q it didn't happen or you don't remember?

A It's just that it's been ten years since all of this happened, and I don't remember — I don't remember everything.

PAGE 105 line 1

Q I understand, but you wrote a statement, right?

A Yes.

Q And –

A Twice.

Q You made two written statements?

A Yes.

Q To the Irving Police Department?

A Yes.

Q And you had a chance to go over your statement with the prosecutor, didn't you?

A Yes.

Q And I guess you went over–What I'm showing you is Defendant's Exhibit 2. You had a chance to go over that, correct?

A Yes.

Q And you went over the questioning with the prosecutor, correct?

A Yes.

Q And there was an interpreter involved, correct?

A Yes.

Q So,you understood everything that you were reviewing, correct?

A Yes.

Q Well, in your statement, you said that "Martin grabbed the boots and then he disappeared after that"–

CONTINUES NEXT PAGE 106 line 1

or, where he went after that, you don't know.

A Yes.

Q Is that correct?

A Yes.

Q And you're saying that if anyone saw you – I'm sorry. You're saying that if anyone saw drugs in the boots that that was just a lie?

A Yes.

Q But you do say that there was money in the boots, correct?

A Yes.

Q And a chain?

A Yes.

Q But you would say it's a lie that there were drugs in there?

A I didn't see that.

Q Well, earlier you said it was a lie. So, are you just saying now you didn't see?

A Yes, It's a lie because I didn't see the other. I just say the money and the chain.

Q And there was a pager in there, as well, wasn't there?

A I don't remember. I don't know.

Q And did your brother — You knew your brother to have a weapon, didn't you?

PAGE 107 line 1

A No.

Q You never knew him to carry a handgun?

A No.

Q Also, you told the detective – Well, I'm sorry. Earlier, you said that you saw your brother on June 11th, correct?

THE INTERPRETER: I'm sorry, counsel. Repeat that.

Q [By Mr. Montalvo] You said that you saw your brother on July 11th – on June 11th, correct?

A Yes.

Q And isn't it true that you told the detective that your brother had not been coming around lately?

A No. I said that my brother was there. Because my brother went there that night to eat dinner on June the 11th.

Q So, If you told them that he had not been coming around lately, that's just incorrect?

A No, I told them my brother had got there the night before. I remember that.

Q The first time you mentioned to the authorities that Rafael Gonzales was your brother's

shooter was when you were back in your apartment, correct?

A Yes.

Q And that was after you had seen Martin,

NEXT PAGE 108 line 1

correct?

A I'm sorry, what's the question?

Q that was after you had seen Martin, correct?

A After I gave my statement?

Q No. When you mentioned–When you first mentioned that my client was the shooter to the authorities, that was after you had seen Martin, correct?

A I don't' remember.

RELEVANT DISCUSSION line 33

Q And I just asked you if, when you were back in your apartment, was that the first time you mentioned that your brother [sic] was the shooter to the authorities?

Continues next page 109 line 1

A I'm sorry, what?

Q I'm sorry. That's the first time you mentioned that Rafael Gonzales was the person that shot your brother.

A Yes.

CONTINUES RELEVANT DISCUSSION Line 15

Q And Martin, did he have any relationship to you?

A We're cousins.

Q Is, Martin, your brother's roommate, is also your cousin.

A Yes.

PAGE 110 Line 7

DIRECT EXAMINATION

BY MR. MONTALVO:

Q Ms. Del Cid, did you have a theft check case?

A No.

Q You never had a misdemeanor case filed resulting from a bad check?

A No.

Q You are Luz Hadid Del Cid, correct?

A Yes.

Q And your date of birth is 12/30/62?

A Yes.

Q I guess that would be you. Do you remember an offense being filed on the 13th of December 2001?

A Yes. I think that was when I made that check, yes.

Q And were there two other ones out of JP court?

A Where?

Q The Justice of the Peace.

A I was there, yes, for tickets

CONTINUES NEXT PAGE 111 line 1

well, again, you are Ms. Luz Hadid Del Cid, 12/30/62, correct?

A Yes.

Q Do you remember having to deal with two issuance of bad checks?

A Two cases?

Q Two cases, yes.

A I guess, I think so.

CONTINUES RELEVANT ISSUE on line 17

Q So you had to come to this building to deal with a criminal case?

A Yes.

Q And do you remember the outcome of that case?

A I was in jail. I don't remember if it was two or three days.

Q So, you spent time in jail as a result of this – of those cases?

A Not time. I mean it was just two days.

CONTINUES NEXT PAGE 112 line 1

Q Well, I guess 48 hours time, you spent time in jail. Is that how you paid for those crimes?

A Yes.

Q Also, have you ever gone by Luz Ramirez?

A That's my second last name.

Q Would that be your mother's or father's?

A My father's

Page 113 Line 1

THE COURT: I mean, unless you can educate me on this, I didn't think IBCs were crimes of moral turpitude, and theft by check probably is.

Next page 114 line 1

she had theft by check and then two issuance of bad checks. Is that right?

MR. MONTALVO: That's right.

THE COURT: But IBC is a crime of moral turpitude.

MS. WILBANKS: IBC is.

PAGE 115 Line 9

REDIRECT EXAMINATION

BY MS. WELBANKS:

Q Ms. Del Cid, I just want to talk for a minute or two about the relationship between your brother, Roberto Velasquez, and the Defendant, Roberto [sic] Gonzales – Rafael Gonzales, I'm sorry.

You said you guys all grew up together in Guatemala; is that right?

A Yes.

Q And when you all moved here, what was the relationship between your brother and Rafael Gonzales?

A They were friends.

Q Did they ever do – What did they do together?

A Well, I don't know, but, I mean, I know that my brother lived with me and he went to my apartment to tell my brother that to draw him out because he thought that he needed to work somewhere else where they were going to

CONTINUES NEXT PAGE 116 line 1

earn a lot of money.

Q Do you know where that was?

A Supposedly he told him that they were going to work with asbesto.

Q Did you give Roberto advice about that?

A Yes. I told him not to leave. I told him not to leave with Rafael because I knew he wasn't – he wasn't into anything good and that he shouldn't be working with that because people said that asbestos gave you cancer.

PAGE 119 line 1 BY WILBANKS

Q And after all this happened and the police were talking to you, before Detective Renfroe talked to you in your apartment, had any of the police officers asked you if you knew who had shot your brother?

A Yes, the detective.

Q But the detective is the first one to asked you if you knew who it was that shot your brother.

A I don't remember if I tld Stella, the manager in the apartments, because she was there and interpreting for me for the detective.

Q But, I mean, as far as the police go, you hadn't told – they hadn't asked you and you hadn't told them who it waa that shot your brother.

A No.

PAGE 128 line 2

DIRECT EXAMINATION OF DARLENE NICOLE KEENER BY WILBANKS

Q You can't see them when you go in. And then, two Spanish guys walked out to the breezeqy area where I could see them. Because the courtyard is right there along with the breezeways, and they were arguing in Spanish, and that's what caught my ear and eyes. So, I looked over there.

And then, they were arguing loud, Went back and forth for a couple of minutes.

Q At some point, did they go back to the car?

A Uh-huh.

Q Did one of them get into the car?

A Yeah, the driver that got out the first time,

Q Okay.. Then what happened?

A They were talking, and wqsn't really paying attention, and then I hear gunshots, o, I look up, and the driver had shot the guy who was standing by the driver's window, And so, I picked my nephew up and I took off running down the sidewalk that was around the breezeway. And the gray car that the Hispanic guy was in – there was two cars next to it, or one, and I ran past them, and there was a trash can I had to run past. And right when I turned around, I looked the driver in the face of the gray car. And he drove away.

PAGE 129 line 1

Q Okay.

A I went inside.

Q Let's stop there and back up just a little bit. So, you're playing with your little nephew out in the sandbox, and you see a couple of gentlemen kind of arguing in the breezeway.

A Two, yes.

Q Okay, And one of those guys went back to the little gray car and got back in?

A They both walked to the car.

Q Okay. But one of them got in the driver's seat.

A ES.

Q Is the other one the guy that stayed out there, or is that the one that got shot?

A Uh-huh. Yes.

Q So, they were arguing before the guy got shot.

A Yes.

Q Okay. And you – And you – could you hear them continuing their conversation when they got back to the car?

A Not really, no. I could hear that they were arguing, but you can't – You could hear real loud voices, but you couldn't hear, no.

Q So, were they speaking Spanish or English?

NEXT PAGE 130 line 1

A Spanish.

Q Do you know Spanish?

A No.

Q But do you know enough to recognize when somebody's speaking in Spanish?

A yes.

Q You just don't know what they're saying.

A I know some Spanish. You know, I have relatives, but not fluent, no.

Q You couldn't pick anything up?

Q No.

Q Was there anyone else standing beside the car with them?

A Not that I can remember.

Q You don't remember a female coming up to the car?

A No.

Q okay. I guess after they went back to the car, did you go back to playing with your nephew in sandbox?

A Yes.

Q So, you weren't watching them constantly?

A No.

Q But you could hear them?

A Yes.

PAGE 131 line 1

Q And then you heard a gunshot?

A I heard a couple.

Q You heard a couple.

When you looked up, what did you see?

A I say the guy kind of collapse.

Q Okay.

A He was already kind of down. And that was really it. I just looked over there, and I picked my nephew up and started to walk away.

Q Did you see the guy in the car with a gun in his hand?

A When I had heard the first and second shot. I had looked up and I had saw he gun out to the side and then I looked at the guy who had coillapsed.

Q So you actually saw the driver in the car with a gun in his hand?

A Yeah. I say him, yeah. He – I know it was the driver because I saw his hand, But I didn't look at his face.

Q Okay.

A Until later.

Q Okay. So, you didn't actually see the driver's face real good until later on.

A Yeah.

Q But you saw the driver's hand outside

NEXT PAGE 132 line 1

the car.

A Yes. Well, not all the way out. But the guy was kind of coruched down when he was talking to him.

Q Uh-huh

A And when I heard the first shot and I heard the second shot, that's when I looked and could see the gun in the hand. Not all the way out extended. You know what I'm talking about?

CONTINUES RELEVANT ISSUES ON PAGE 137 line 20

Q Then what happened?

A And then, I don't know who the lady was or who she was, but she toot off the victim's boots and took off running to the other end of the apartments.

Meanwhile, there was people trying to help the victim, you know, CPR or giving them towels and so

PAGE 138 line 15

Q I have a copy of the statement here, and I know it's been ten years and you've grown up a lot and you've had a lot I on in your life. But let's talk about the statement for a minute.

In the statement, it says that you saw a guy drive up in a white car. Do you think it was white or do you think it was gray?

A No, it was gray.

Q Okay. What makes you think it was gray?

A because I remember.

Q Okay.

NEXT PAGE 139 line 1

A because I know it was gray.

Q Okay. If you said it was a white car back then, would that be right or maybe you just got the shade off or something?

A It may have.

Q Okay.

A I don't know. It was long ago.

And are you sure that you were at the sandbox versus somewhere else?

A Yes, I was at the sandbox.

Q So, if the statement said that you were at or near the swimming pool, would that just be a typo by the police officer maybe?

A Yes.

Q You're certain you were at the sandbox?

A I'm positive.

Q On that same day that you gave a statement to Detective Renfroe, did you look at a set of photos? Did he ask you to look at a set of photos to see if you could recognize the person that you saw, the driver of the car on that day?

A Yes, he did.

Q And there were actually a set of six photos; is that right?

A Yes, ma'am, there was.

UNCORROBORATED TESTIMONY PAGE 142 line 24

Is there anything other than the fact that that's the person that you saw that day at the scene that

ENXT PAGE 143 line 1

differentiates him from anybody else?

A Scar.

Q Okay, but I mean, in the photos.

A No.

Q Is he wearing anything different? I mean, is there aby kin dof markign that made you think, "That's the person," other than the fact that it was him?

A Like what I remember about him?

Q Right.

A The scar?

CROSS EXAMINATION BY MR. MONTALVO

PAGE 145 line 15

Q So, the person that shot the decedent that day, he's the one that backed into the dumpster; is that correct?

A Yes.

Q And you said it was a gray car; is that correct?

Q Yes.

Q Okay. You said that you know that it was a gray car?

A I remember it was a gray car.

Q Okay. And you said that the person that you

CONTINUES REVELANT INFORMATION ON PAGE 149 line 1

A Right.

Q Now, these two men, they were arguing in the breezeway, is that correct?

A Yes.

REDIRECT EXAMINATION

PAGE 151 line 17

REDIRECT EXAMINATION

BY MS. WILBANKS:

Q Ms. Keener, I'm going to go over a little bit of your statement that you gave back in June of 1995, okay?

A yes.

Q You say in your statement that–We've already talked about that you were by the sandbox instead of the swimming, pool, --

NEXT PAGE 152 lien 1

A Yes.

Q -- as it says in the statement.

You said there and a small white car with a Mexican guy –

MR MONTALVO: Your Honor, I'm going to object. Improper bolstering; improper impeachment.

THE COURT: Overruled.

MR. MONTALVO: Object to her reading from an item that's not in evidence.

THE COURT: For what?

MR. MONTALVO: An item that's not in evidence.

THE COURT: Were you doing that?

MR. WILBANKS: Yes, I was about to read from her statement.

THE COURT; Sustained.

PAGE 153 line 7

BY MS. WILBANKS: [Resuming]

Q Ms. Keener, I know it's been ten years since this event happened. Back on June 19th, 1995, you gave Detective Renfroe a statement at the police department, right?

A Yes.

CONTINUES ON PAGE 156 linw 2

Q I want yo to read over this sstatemtn to yourself, and I'm going to give you a couple of minutes to do that.

A [Witness ocmplies.]

Q Have read over it?

A Yes.

Q Now, some of the things in the statement are different than what you've said here today in the courtroom.

A Yes.

Q Okay. Now, I'm just going to go through those and give you a chance to explain why they're different.

A Okay.

Q First of all, we've talked already that in the beginning it says that you were near the apartment swimming pool. Is that true or not?

Q No.

Q Where were you?

A At the park in the sandbox.

Q Okay. Why do you think that that's different?

A Because I had my nephew an plus the pool was closed, so there was no reason for me to be over therw.

Q So, you think that maybe that's just a typographical error?

CONTINUES NEXT PAGE 157 line 1

A Uh-huh. I was at the park, yes.

Q okay. And you remember telling the detective that you were at the park?

Q Yes.

Q Okay It say here that you saw a small, white car with a Mexican guy pull into the parking lot.

A I'm saying gray. It might have been a white. But I I a gray hatchback. And I want to call them shutters on the back to block the sun of the hatchback. I know I were ray. That may be hwy I'm putting this car gay. But I remember gray.

Q So you remember gray, tinted all different shades of gray or dark gray?

Q May have been a dirty white car.

Q Okay.

Q But I just remember gray.

Q Okay. Do you remember it as being light gray, dark gray? Medium –

A Light.

Q okay. Do you remember it being a light gray in your head?

A Yes.

Q But here you said white.

A Yes

Q So, do yo think it could have been white?

PAGE 158 line 1

A It could have been white.

Q Okay. And you're just maybe remembering it wrong? But it could have been white, could have been light gray.

A Right.

Q Okay. And then you said it was followed by car that looked like the same make, but it was maroon and had dark tinted windows and had two Mexican guys in it.

Now, today, you didn't mention anything about a maroon car.

A I don't remember a maroon car.

Q You don't remember a maroon car at all?

A No.

Q You say here that the white car pulled into the curb near the pool and parked, and then the maroom car backed near the other car next to the dumpster, and they just sat there.

CONTINUES NEXT REVELANT PAGE 159 line 1

A next to the dumpster.

Q -- next to the dumpster it hta statemetn, but you don't remember that.

A No.

Q Now, it's a week later then and now it's ten years later and you've gone through all these life experiences. Do you think that that's probably what happened?

A Probably.

MR. MONTALVO: your Honor, I'm going to object to improper bolsterign. She's testifying for the witness.

THE COURT: Well, if that's the same objection as to leading, then your objection, is sustained.

RELEVANT ISSUE PAGE 161 line 10

Q Okay. And you saw – As you looked back, you saw the maroon car with the two Mexicans in it and they were turning to the lady that had been standing by the guy that got shot and were screaming and yelling and holding on to the window of their car.

Now, today, you didn't mention abything about that.

A I don't remember it. I remember a lady there after it happened screaming and yelling, but I don't remember her hanging on the car.

Q Okay, that's fine. So, you don't remember that part.

PAGE 163 line 16

Q And is that the same man that you picked out in a photo line-upon the same date that you gave the statement?

A Yes.

Q Do you see that person in the courtroom today?

A Yes.

Q Tell the jurors what he's wearing

A black jacket, headphones set, plaid shirt.

PAGE 186 line 9 (DIRECT EXAMINATION OF DETECTIVE RENFROE)

Q What do you mean you "didn't have probable cause"?

A We interviewed people at the scene, and we weren't able to obtain enough information to show that they participated.

Q Simply being at the scene of a crime is not enough to charge somebody as an accomplice or a party to murder, is it?

A That's true.

CONTINUED REVEALNT PAGE 189 line 1

another Hispanic gentleman were in there, correct?

A That's true.

Q Someone you later learned ot be Martin Cordova; is that correct?

A Yeah, I was told that was his name.

Q Well, not I a general investigatin, but with regarding – with regard to the botos; is sthat correct?

A Yes. Yes.

Q It's fair to say that you were told by and paramedics that she had taken off the boots and that they had seen powder – a white powder in a Ziploc bag, money, and a weapon – what they believed to be a weapon, correct?

A That's true.

Q And that I come to you from just one person. That was several people's concern is that correct?

REPORTER'S RECORD
July 14, 2005
Court Trial Cause No. F01-01091-R
VOLUME 9 OF 10
GUILT/INNOCENCE PHASE

PAGE 7 line 1

THE COURT: All right.

(Off-the-record discussion at the bench)

THE COURT: Go ahead, sir.

MR. MONTALVO: Thank you, Judge.

Q (By Mr. Montalvo) Again, we have gone through the guilt/innocence phase, and the jury has come back with their verdict. And how do you feel about that or what do you say about that?

A That I'm innocent.

PAGE 8 line 1

Q And are they boys or girls?

A Females.

Q And what are their ages?

A 18 and 14.

Q And have you had contact with them or any of your family members back in Guatemala?

A Yes.

Q And do you know of their situation in Guatemala?

A They're not over there right now.

Q Where are they?

A In New York.

Q And has their life been easy or hard?

A The hardest that it can be.

Q And where are you from in Guatemala?

A Progresso Huastotaya.

THE COURT REPORTER: You want to spell that?

THE INTERPETER: H U A S T O T A Y A.

Q (By Mr. Montalvo) And how big of a town or village is it?

A Two hundred. It is small, very small.

Q And when you were here in the United States, were you working?

A Yes.

Q And with that money, were you using that to help your family?

NEXT PAGE 9 line

A Yes.

Q And we talked about what Roberto Alcides Velasquez's family was going through, did we not?

A Yes.

Q And you told me, did you not, that you were very sad and sorry for what they had gone through and they were in your prayers, correct?

A It is the most difficult thing that a family can face.

MR. MONTALVO: Pass the witness.

CROSS EXAMINATION BY MS. WILBANKS: Page 9 line 11

COROSS EXAMINATION

BY MS. WILBANKS:

Q you just sat up there and told the jury that you're innocent?

A Yes.

Q So you're sitting up there after they have found you guilty and you're saying I didn't do it?

A Yes.

Q You're sitting up there saying that Luz Del Cid got on the stand and lied for whatever reason to convict an innocent person?

A I don't know what the reason was, but she did.

Q And you're saying that some girl that you had never ever seen before who was 14 years old at the time who picked you out of a photo lineup a week later is also lying about the

CONTINUES NEXT PAGE 10 line 1

fact that you did it?

A She is lying

Q Where were you that day?

A I worked painting houses. And what they accuse me of, I heard about that five years after.

Q So you're telling the jury that you weren't even there at the scene?

A Yes.

Q That is a lie, isn't it, Mr. Gonzales?

A Lying?

Q Yes, that you weren't even there.

A It is true that I wasn't there.

Q If you weren't there, why does Nicole Keener pick you up out of a lineup a week later?

A I don't know, but I wasn't there.

Q Why does Luz Del Cid, who has known you years and years, since you were a kid, say that you were there if you weren't there?

A But she lied.

Q Do you know Albino Chivarerra (phonetic)?

A Yes.

Q Do you know Roberto Ramirez?

A Yes.

Q You hung out with them, didn't you?

A No.

NEXT PAGE 11 line 1

Q No, you didn't?

A No.

Q Did you hang out with Roberto Velasquez?

A No.

Q Did you ever live with Roberto Velasquez?

A No.

PAGE 11 line 7

Q Well, you had the same address on your driver's license.

A He lived in one place or another and that was a sure place for him to receive mail

Q So you're saying you never lived with him?

A Yes.

Q Who were you with painting houses on that day?

A I would work with someone different every day. I would go out to work in different places. I didn't have a social security or anything to get a good job.

Q So are you saying you don't know who those people are so you couldn't bring them here to testify for you?

A No, I don't know.

Q So you don't know what?

A They come in a car and they pick you up and they pay you in the afternoon.

Q So you're saying you don't know who they are?

A No.

PAGE 13 line 2

A Bck in 1995 when you were here, you had several ID's, didn't you?

A Two.

Q One of those was in the name of Pedro Pantaleon, right?

A Yes.

THE COURT REPORTER: You want to spell the last name?

MS. WILBANKS: the last is P A N T A L E O N.

Q (BY Ms. Wilbanks) Is that the same that you used?

A Yes.

Q You used false information to obtain that license, didn't you?

A Yes.

Q Right after this, why did you go back to Guatemala?

A Because I had to be with my family.

Q Who was down there?

A my wife, my daughters and my parents, who I had to help.

Q But your wife came here with you to the United States , didn't she?

A Yes.

Q Are you saying that she left and went back to Guatemala?

PAGE 28 line 8

Punish him for his conduct. This was not an accidental killing or a killing for any good reason. The man that you see here in the courtroom, look at him. Take a look at him. He couldn't look you in the eye when he testified, but look at him.

I don't know how many times ever again in your life you're going to be in the same room as a murderer, and you certainly won't be ever able to be in the same room as a murderer and be able to do something about it. But my biggest fear in this case is that what you're going to do is consider some of things that were going on in his life when he was a young man 20 years old.

We have evidence of the guns. We have the evidence of the drugs. Some testimony that he was out there robbing people, We knew that he and r. Gonzles were hanging out together. We knew they were friends with each other, according to Ms. Del Cid. Who knows what they were doing? Who knows what they were doing together? Who knows what the killing was

NEXT PAGE 29 line 1

for?

PAGE 70 line 8

Mr. Hughes. Two sets of shots. The other one, there's a shot without any residue in the cheek. He said that he was shot in the courtyard. He thought he was shot in the shoulder. But he falls, his eyes roll back, takes his last breath.

Ms. Del Cid, "I walked up to him. He said, 'Take the money for my mother.'"

Now, he's fair and impartial. He has no relation to them. Or, I guess you're supposed to set his testimony aside. You know, where things don't – where the things don't line up, you're supposed to just put her testimony on the top.

She goes over there. He says, "Take the money for my mother." We know there was a Ziploc and there was a chain. I don't know, is it important? You know, it's important when you're deciding somebody's credibility, Ut's important when someone is telling you that this man, my client, did it, but then their story's

CONTINUES NEXT PAGE 71 line 1

starting not to match on other things. What is that about? Why has that happened?

She grabbed the boots and ran. She ran with Martin. "No, he wasn't there. I did it by myself."

He leaves . Why? I don't know.

Another thing is that he say there's no physical evidence. Well, one of these shows that there are – Says she's standing behind her brother. You have bullet wounds behind him, exit wounds behind him.

Rafael was always over. Why is that important? We'll talk about that in a little bit.

Nicole Keener. You look, her statement says she's at the pool. But then that's just a typo.

So, again, wherever there's inconsistencies in the State's case, you're supposed to take the witnesses they want you to believe and just – That's what overlaps. Ignore the rest of the stuff.

She says she was as sure that my client was the shooter as she is sure that it was a gray car and it was the one that backed into the dumpster. She's as sure that it's him as she is of those things.

We find out from Detective Renfroe, Albino's got the gray car. Why? I don't know.

Motive. And he says it's not to be proved – You know, the State doesn't have to prove it.

PAGE 72 line 1

But don't you wonder why there are those things lining up? Don't you wonder why there are inconsistencies in their story? The gray car is Albino. Albino is the one she goes and attacks. She tells you. You hear that from her. Doesn't it make sense, if somebody shot your brother, you'd go right to the one that shot your brother?

And if you look at Ms. Keener's statement, it says the person backed out slowly, as if nothing ....

You want to read that statemetn? Read it. There's just too many, inconsistencies in this case in this testimony.

And the mother. Again I – You know, I have all the sympathies in the world. But when she gets up here, there was just hatred. And she's basing – If it's hatred because she thinks he's the shooter,

she's heard it from Ms. Del Cid. She's heard it from everyone else. There's just pure hatred.

And when I talked about the families weren't getting together, I didn't talk about the shooting, I'm talking albout before. And you go to see some of that from the witness stand.

You know, either my client is a cold-blooded killer to shoot a man three times and leaves residue and once from the same distance and does not

NEXT PAGE 73 line 1

leave residue. And get residue on the back. Or, he's being set up. Which is it?

Your job is not to give her the benefit of the doubt here. Your job is to sort through the facts.

We talked about on voir dire how people can get mistaken for other people. You know, is that the case here with Ms. Keener – Mrs. Keener? And are you sure that that' s not the case? Are you sure beyond a reasonable doubt, or is that reasonable that she could have mistaken him for someone who had been there before? She sees a six-photo line-up of someone that she seen before at that complex.

PAGE 73 line 22

I now ten years has passed. But you have ten years for this case to go south, or you have the years to make the case. You know, go over the statements with your witnesses. She didn't. She got up here and

CONTINUES NEXT PAGE 74 line 1

she testified just form her memory. And then she reviewed it again, and she still stuck with that story.

You can't put the blame on anyone but the State. You can't hold the defense to any standard. It's the highest standard known to law. It's a higher standard than they use to take way your kids. Beyond a reasonable doubt. And that standard has not been achieved here today.

And it's for that reason, and for that reason alone, I ask you to find my client not guilty.

Thank you.

APPLICATION FOR PROBATION PAGE 84 line 20

MR. BIRMINGHAM: I mean, how are you going to prove up your application? We'll just offer it. How do you prove up an application?

MR. MONTALVO: I'm going to have to put him on just for that one question.

THE COURT: Well said.

REVELANT PAGE 68 line

And the State has the burden, Who's not here? The paramedics. You heard a lot of talk about the boots and whether there's drugs and whether there was a gun and all that kind of stuff. Money in a Ziploc bag. Well, if the paramedics would have backed up Ms. Del Cid's story, don't you know they'd be sitting in that chair? Absolutely. We didn't see it either.

What did you hear? Detective Renfroe said that, "Yeah, I was told that there were drugs and a gun and lots of money in a boot." And then she took off running with it. Stick with actions. If a person has just lost their brother, lets him fall, goes after someone else. Not the shooter, someone else. Sees him

CONTINUES NEXT PAGE 69 line 1

run. Takes off his boots. And according to whoever you believe, runs or is escorted or whatever to her apartment with Martin who was there after – "No, I saw him before the shooting. He was walking in front of, no, he was walking behind him."

Apparently, he shows up after the shooting, mysteriously, out of nowhere. No. Something just smells.

Detective Renfroe goes to her apartment, knocks on the door, there's no one in there. No mention of Jameson. No mention of Martin. All of a sudden, he's gone. Asked her if he's a witness.

"Yes, he's a witness."

"Where is he?"

"He's in Guatemala."

Well, you know, because, my client's in Guatemala, he's guilty. Well, now, what about Martin? Why is he in Guatemala? I mean, if you want to be consistent, be consistent. There's a lot of inconsistencies in this.

Hector gets up here and talks about his brother being involved in a robbery. Stole his car. "Yes, I reported it . No, I was on my way to report it when I heard about my brother being shot."

Is it important? That's up to you to

CONTINUES NEXT PAGE 70 line 1

decide. But there's just little things that are just in this case.

"My brother, I saw him the 11th. My brother, I saw him the 11th."

"Detective Renfroe, they said they hadn't seen much of him lately; is that correct?"

"Yes."

CLOSING ARGUMENTS BY THE STATE Page 58 continues line 22

The prosecution has the burden of proving the defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt, and if it fails to do so, you must

CONTINUES NEXT PAGE 59 linw 1

acquit the defendant.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict not guilty.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and the weight to be given their testimony, but you are bound to receive the law from the Court, which is given you herein

(DIRECT EXAMINAITON OF DAVID WALKER SPENCE TX. DEPT. PUB. SFTY. CRIME LAB) Page 32 ln 19

Q What were the results of Ms. Hall's examination of the hand wipings from Roberto Velasquez?

A Ms. Hall found levels of antimony barium and lead on the palm of the left hand of Roberto Velasquez? That were consistent with – or, the characteristics of gunshot residue, In other words, there were gunshot residues found on the palm of the left hand of Mr. Velasquez.

NEXT CONTINUING PAGE 33 line 1

Q What does that tell us?

A Well, it tells us that primer residues were on his hand, and that, in fact, either means that he had recently fired a weapon or was in close proximity to a weapon when the weapon was fired or that he may have handled a weapon which had previously been fired.

Q So, any one of the three scenarios?

A That's correct.

Q When someone fires a gun, does the gunshot residue generally land on their palms?

Q When they fire a weapon?

A Yes.

(APPELLANT ASSERTING HIS RIGHT TO REMAIN SILENT BY MONTALVO) page 51 line 1

DIRECT EXAMINATION

BY MR. MONTALVO:

Q Mr. Gonzales, we have gone over this case and we've reviewed this case and you've been sitting in the courtroom the whole time the testimony's been going on; is that correct?

A Yes.

Q And I've explained to you that the jury trial and the right to testify is your absolute right. You are the one that determines both of those, correct? I've explained that to you, correct?

A Yes.

Q And today, after we discussed this, you've decided that you wish not to testify, correct?

A Yes.

Q And I've also given you my opinion as to that, correct?

A Yes.

MR: MONTALVO: I have nothing further, Judge.

THE COURT: All right. Thank you, sir.

MOTION FOR DIRECT VERDICT BY GONZALEZ Page 52 line3

MR. MONTALVO: may I also make a quick motion?

THE COURT: You can. Go ahead.

MR. MONTALVO: We'd make a motion for directed verdict, Your Honor, in the sense that

homicide has not been established. The M.E. said the manner of death was multiple gunshot wounds, not homicide.

THE COURT: All right. That's denied. Bring in our jury.

CLOSING ARGUMENTS BY THE STATE Page 57 line 1

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the defendant has elected not to testify, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into any consideration for any purpose whatsoever as a circumstance against the defendant.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 12th day of June, 1995, in Dallas County, Texas, the Defendant, Rafael Arriaza Gonzales, did unlawfully then and there knowingly or intentionally cause the dearth of Roberto Alcides Velasquez, an individual, by shootbng said Roberto Alcides Velasquez with a firearm, a deadly weapon, then you will find the Defendant guilty of murder as charged in the indictment.

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the Defendant.

You are instructed that you may consider all relevant facts and circumstances surrounding the killing, if any, and the previous relationship existing

CONTINUES NEXT PAGE 58 line 1

between the accused and the deceased, together with all relevant facts and circumstances going to show

the condition of the mind of the accused at the time of the offense, if any.

A grand jury indictment is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the issue of guilt of the defendant. The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the Defendant.

All persons are presumed to be innocent, and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with the offense gives rise to no interference of guilt at his trial. In case you have a reasonable dount as to defendant's guilt after considering all the evidence before you and these instrucitons, you will acquit him and say by your verdict not guilty.

PAGE 31 line 19

MR. MONTALVO: May it please the Court. Counsel. Ladies and gentlemen of the jury.

One of the things that Mr. Birmingham started with on voir dire is your role, as he said. And you notice I stood up and I objected. Because your role, as I said on voir dire, is to be fair and unbiased. You aren't supposed to come in here with your ropes and torches and decide that you're just going

CONTINUES NEXT PAGE 32 line 1

to throw anybody awar.

Like I said, this isn't a lynch mob. It is a court 1f law where 12 citizens are chosen to hear evidence and decide your verdict. And they're going

to make a big deal about my client saying he was innocent. Well, if he has felt that from the very beginning, I mean, is your verdict supposed to change that? And we respect your verdict. He said I accept it, But he was just being truthful up there, Asked about the ID, he said, yeah, I did it.

Another thing Mr. Birmingham said, which I think is very, very important, his biggest fear, his biggest fear is that you will take his actions into consideration. Well, his biggest fear equals you considering all of the evidence. You're considering his actions as well. You're considering the fact that he ahd $1,100 in 20's, drug money.

And he had a gun. He had hand handwipings that showed he had a gun, and they said, well, it was from a palm at seven to nine feet. He has got a gun in his boot. It makes sense that he was handling a gun.

And you heard Mr. Hughes say that it was – he thought it was a drug deal that had gone bad. You heard two different groupings of shots. Do we know exactly what happened out there? No. Otherwise, you wouldn't have taken four hours.

CONTINUED RELEVANCY PAGE 33 line 3

Well, when you don't know about something you're accused of, what else would you be – they're going to tell you that action is consistent with somebody that is guilty. Well, those actions are consistent with someone that believes that they're not guilty. So again, you're going to have a tough situation on your hands.

We also talked about – they brought up Dina Avalaos, Ms. Arriaza, Luz Del Cid's daughter, his cousin's daughter, who she said was left. And it

came out on punishment so I will just talk about it briefly. They said there was no animosity.

In Latin America, a man leaves a woman that is pregnant. Why would she lie? Why would they lie? We don't know. That must have been something we discussed earlier in a different phase. We just bring that up at this point since it came out during punishment. Just something for y'all to consider.

PAGE 35 Line 1

And their biggest fear is if you look at his conduct. Well, they should be afraid. They should be afraid. His wasn't a man that was just out being law-abiding. You heard from his brother that he took his car, his own brother's car. You heard about him – you heard about a robbery from his own brother. You heard about the Ziploc bag with white powdery substance that suddenly disappeared. Heard about a gun and all the money in the boot and in his pocket, over $2,200.

You know, in this situation – oh, and incidentally, even the police got that money. Even the police waited to see, you know, this could be related to drugs. The police didn't have any sympathy at that time for anyone. They were still doing their job. And then they didn't release it until afterwards, until they couldn't prove that it was related to drugs because the drugs were gone. This is about my client and his life as well.

* * * *

APPENDIX Q-5

RUSS HENRICHS
ATTORNEY AT LAW
P.O. BOX 190983
DALLAS, TEXAS 75219
(214) 314-5038 (voice mail)
(214) 651-0759
(214) 319-7333 (fax)

July 13, 2006

Mr. Rafael Gonzales
TDC 1316090
Dick Ware Unit
PO Box 2500
Colorado City, TX 79512

Dear Mr. Gonzales:

Enclosed please find a copy of an opinion I received affirming your conviction. My appointment to represent you is now over.

Your next option is filing a Petition for Discretionary Review with a Court of Criminal Appeals. The petition is actually filed at the Court of Appeals in Dallas and they forward it to Austin. The Court will not appoint me to file this. You should either hire a lawyer or contact Staff Counsel for Inmates at the prison for assistance.

This petition must be filed within 30 days of the date the Court of Appeals issued its opinion.

Since this is your next appellate remedy and

pursuing all of your appellate remedies is important, I suggest that you pursue this petition.

If you do not file a Petition for Discretionary Review with a Court of Criminal Appeals (or if you file one that is denied) you need to be aware that an Art. 11.07 Code of Criminal Procedure writ must be filed within one year from the date the Court of Appeals affirmed your conviction – in other words on or before July 11, 2007. This time limit is jurisdictional, i.e., if you miss by one day, if the post office delivers it to the wrong address, for whatever reason, your writ will be denied. This one-year limit also applies to filing a federal writ. In other words, if you do not file a state 11.07 writ, you must file your federal writ by July 11, 2007. If you file the 11.07, then you would have one year after an adverse decision to file the federal writ. You should either hire a lawyer or contact Staff Counsel for Inmates at the prison for assistance.

Good luck on this.

Best regards,
/s/ Russ Henrichs
Russ Henrichs

RH/dg
Enclosure

APPENDIX Q-6

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

RAFAEL ARRIAZA GONZALEZ, aka Rafael Arriaza Gonzales, #1316090	§	
Petitioner,	§	3:08-CV-0151-D
v.	§	
NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Coorectional Institutions Division, ("TDCJ")	§	
Respondent.	§	

OBJECTION TO FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE U.S. MAGISTRATE JDUGE

NOW COMES, Rafael Arriaza Gonzalez, petitioner pro-se, with the above and in support states:

1. Petitioner is a native from the country of Guatemala with no propep knowledge of the english language (read & write) detrimental to his lack of legalese also in english & latin. He is being assisted with the typing, translation and preparation of this

instant case by an honest inmate (This inmate pleads to this court, respondent & any other parties to DO NOT CONFUSE him with an experience) writ writer or jailhouse lawyer as this court, respondent & parties label him because he does not have the years and years of cirminal law experience, practice or courtroom veteran legal debate, tactics, sparing or influence before any court and to label him as such would infer the court and all parties that he is not pro-se. Additionally, even 5 years this inmate has been studying, researching & reading legal books does not get close to him being certified as a lawyer.) To label or title him as writ writer or jailhouse lawyer is deceitful for he is only a common inmate trying to interporet law books. and learning to apply the interpretations of the rules, procedures, formats, pleadings, statutes, codes, articles and sections of state & federal statutes to assist the petitioner in this case.

2. This petitioner seeks the application and protection of the State of Texas Constitutional articles 1-10 & the seeks the application and protection of the United States Constitutional Amendments 1, 5, 6, 7, 8, & 14th specifically 1 (redress of grievances) & 14ht the Equal Protection Clause with all Due Process Rights (proper due process). as a pro-se status to this at his attempt to convey his (petitioner's message (pleadings) of his innocencevicariously thru this inmate.

CONSTITUTIONAL PRO-SE STATUS PROTECTION

This petitioner thru this honest inmate assisting him, is seeking constitutional protection pursuant to

U.S. Supreme Court case; Haines v. Kerner, 404 U.S. 519-20, 92 SCt. 594-95, 30 L.Ed2d 652 (1972); "pro-se complaints are held to a less stringent standard than formal pleadings by attorneys."

In Hughes v. Dretke, 412 F3d 582 (5th cir 2005); "Pure questions of fact are governed by § 2254(d)(2), in addition, a state court's factual findings are entitled to deference on federal review. Unless the petitioner rebuts those findings with "clear and convincing evidence," this deference extends not only to express findings of fact, but to the implicit findings of the state court."

This petitioner will and is trying to present in clear common language (layman's terms) that upto to his layman's understanding of the law books, he is correct about the MANDATE application. or time calculations.

GENERAL ISSUES

This petitioner's issues are:

1. SPEEDY TRIAL VIOLATIONS;
2. TAINTED EVIDENCE;
3. VIOLATION OF HISRIGHT TO REMAIN SILENT; and
4. THE STATE'S DENIAL OF PETITIONER TO ACQUIRE COPIES OF THE CLERK'S RECORD & REPORTER'S RECORD (I.E., THE TRIAL TRANSCRIPT TO SUBSTANTIATE HIS CLAIMS).

This last issue #4 this petitioner has due diligently tried very respectfully before the district clerk, trial clerk and has not received a reply or respond and lastly he filed all his filings with respect* for he necessitates the court record to substantiate factually & accurately his claim of innocences and the issues presented above.*(Respect due to the courts or clerks).

REBUTTAL TO THE RESPONDENT'S CLAIMS AND PETITIONER'S

MOTION FOR CONTINUANCE AFTER THE STATE PROVIDES COPIES OF RECORD

THE STATE'S CLAIM PETITIONER IS TIME BARRED FOR THIS INSTANT 28 U.S.C. § 2254 APPLICATION

The one-year period is calculated from the latest either:

A. the date on which the judgment of conviction became final;

B. the date on which an impediment to filing an application created by State action in violation of the Constitution or laws of the United

States is removed, if applicant was prevented from filing by such State action;

C. the date on which the Supreme Court initially recognizes a new constitutional right, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

D. the date on which the facts supporting the claim became known or could have become known through the exercise of due diligence.

TRAVERSE

The state claims;and all parties agree that this petitioner's conviction by a jury was July 14, 2005 and the state court of appeals affirmed his conviction on July 12, 2006, he did not file a petition for discretionary review (PDR) or rehearing and thus his conviction became final 30 days the judgment was affirmed or the stay says August 11, 2006, due following Monday 8/14/06.

TRAVERSE DISCUSSION BY PETITIONER: Petitioner's mandate was not issued till on September 26, 2006. If this petitioner had attempted to file a state application 11.07 "writ of habeas corpus" he would have been procedurally barred by the state because the mandate had not been issued. i.e., he would be prematurely filing, submitting or applying for a writ to the state convicting court.

In **Ex parte Brown**, 662 SW2d 3 (Tex.Crim.App. 1983) "a post conviction application for writ of habeas corpus will not be considered when the direct appeal of a conviction is pending review before an appellate court since the conviction is not final." See also **Ex parte Johnson**, 12 SW3d 472, 472 (Tex.Crim.App 2000), and **Ex parte Vega** cause #974863 208th District Court (Tex.App. 2005) 10/12/06 Harris County, his mandate was issued till---November 30, 2006 one (1) month 18 days after he had filed his 11.07 being prematurely barred.

If this isntant petitioner had filed his state habeas application 11.07 after 8/14/06 or before 9/26/06 (before the mandate was issued) he would have been procedurally barred due to filing it prematurely. **NOTE: Pursuant to the Texas Rules of appellate Procedure (TRAP) rule 47,**

48, 49 50 & 51 cite 15 days for rehearing, 30 for PDR & 30 on time to issue MANDATE.

CASE CHRONOLOGICAL ORDER & FILING OF HIS HABEAS REVIEW

After 9/26/06 when the mandate was issued this petitioner filed his initial Texas Code of Criminal Procedure (TCCP) article 11.07 application for a state writ of habeas corpus petition, on Feb. 8, 20077 & returned for non-compliance with appellate rules.

On this petitioner properly filed his 11.07 application. This state application remains pending until its denial 11/21/07. NOTE: This court or respondent very curiously tries to point-out that this is 341 days to the one-year limitations period had elapsed. REPLY: Following the Southwestern Reporter case law publications and, awaiting new case-law rulings or decisions is a proper form to wait to the last minute to file a ppoerp case-law based, using relevant or precedent setting cases in a brief in support of any state or federal writ of habeas corpus applications or petitions.

The respondent properly cites that the one-year period resumes running on 11/22/07. (Then this respondent claims 24 days later, that is on 12/16/07 was the due date, but since this date fell on a Sunday the limitations was extended to the following Monday 12/17/07..

EQUITABLE TOLLING

To able, preserve this issue, this doctrine does apply in case it applies, but let's say the expiration date was 12/17/07, then the denial by the state of copies of records prolonged or delayed petitioner from filing § 2254 earlier, for he needed the court record, and was impeded by the state but not replying to his requests or directing him to proopr appeals for records.

In Lawrence v. Florida 549 U.S. ___ (2007) No. 05-8820 § 2263(b)(2) ("until the final state court disposition of such petition") § 2244(d)(2) ("A properly filed application for state post-conviction or toher collateral review...is pending") tolls this period..emphasis added mine..till the mandate is issued.

CALCULATION FOR § 2254 APPLICATION

Trial judgment/conviction.	7/11/05
Guilty verdict	7/14/05
Timely appeal	7/15/05
Appeal affirmed	7/12/06
Mandate is issued	9/26/06
State writ filed by petitioner	7/02/07
Writ denied	11/21/07
Mailed § 2254 application	1/24/08

54 days remaining

NOTE: MAILED APPLIES AS MAIL BOX RULE IN SPOTVILLE V. CAIN 149 F3D 374, 378 (5th cir 1998).

RELIEF SOUGHT

This application is timely filed and to continue with 2254 and to ocntinue with 2254 and for the state to provide the record>

Respectfully submitted,

/s/ Rafael Arriaza Gonzalez

Date: 7-29-08

Rafael Arriaza Gonzalez

TDCJ#1316090

Lynaugh Unit
1098 S. wy 2037
fort Stockton, TX 79735

APPENDIX Q-7

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

RAFAEL ARRIAZA GONZALEZ TDCJ-CID No. 1316090 Petitioner, v. NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division. Respondent.	)))) No. 3:08-CV-0151-D (AH)) ECF) Referred to U.S. Magistrate)))

REPLY TO RESPONDENT'S ANSWER

COMES NOW, Rafael Arriaza Gonzalez, petitioner pro-se a Texas prisoner and native of the country of Guatemala, being assisted with the typing, translation & preparation of this reply to respondent's answer, in support states:

CASE HISTORY IN STATE PROCEEDINGS

On June 2, 1995, petitioner was indicted in a murder that occurred in Dallas, Texas. Nearly ten years later July 14, 2005, after proclaiming his innocence & remaining silent, a Dallas, Texas, jury

convicted him and sentenced him to 30 years. July 15, 2005, he filed his timely notice of appeal.

On July 12, 2006, the Fifth Court of Appeals in Dallas affirmed his judgment. September 26, 2006 mandated was issued.

February 2, 2007, petitioner mailed* his first application for a state writ of habeas corpus (art. 11.07). but was returned April 11, 2007, for failure to comply with appellate rules.

July 2, 2007, he mailed his corrected proper 11.07 application and it was denied on November 21, 2007.

*See Spotville v. Cain 149 F3d 374, 378 (5th Cir. 1998) mail-box rule applies when pro-se prisoner deposits a federal petition in the mail it's mailed.

CASE HISTORY IN THIS INSTANT § 2254 PPLICATION

On 1-24-08, petitioner mailed this instant application § 2254 and was returned by the institutional mailroom for lack of proper postage, and petitioner mailed back the application with proper postage on January 28, 2009.

PETITIONER'S GROUNDS FOR REVIEW IN § 2254 PPLICATION

1. The state violated his right to speedy trial;
2. Gonzalez's (petitioner) trial attorney was ineffective in permitting the state to re-indict him after extradition;
3. The conviction was obtained with tainted evidence and faulty witness recollection;
4. The state's refusal to give him copies of the records violates due process; and

5. The Fifth Court of Appeals violated his Fifth Amendment right to remain silent by noting that he did not testify at trial.

On 2-5-08 this court assigned a U.S. Magistrate judge and numbered this xase# 3:08-CV-0151-D(AH) and this court filed an "Order Requiring Respondent to Show Cause" giving respondent 30 days to file an answer, and 30 days to petitioner to reply.

On March 6, 2008, respondent filed his first motion for Extension of time, and was granted till April 11, 2008.

On April 14, 2008 this petitioner receives answer (Respondent) letter was dated April 11, 2008) and notice at this institution's mailroom.

On May 9, 2008, this petitioner mailed his "PETITIONER'S PRO-SE MOTION FOR EXTENSION OF TIME TO REPLY TO RESPONDENT'S ANSWER TO PETITIONER'S § 2254 APPLICATION."

Today, Tuesday May 13, 2008, this petitioner mails this instant on-time brief titled "REPLY TO RESPONDENT'S ANSWER."

REPLY

In respondent's answer to petitioner's application's grounds for review, the respondent answers and rebuttals petitioner's allegations as follows:

1. STATUTE OF LIMITATIONS (that petitioner is out-of-time);
2. EXHAUSTION AND PROCEDURAL DEFAULT (didn't exhaust all state remedies);

3. SPEEDY TRIAL (that the state court didn't violate the speedy trial law by reindicting him 10 years later);
4. INEFFECTIVE ASSISTANCE (that petitioner's claim that there was ineffective assistance by permitting him to be reindicted, and that is conclusory allegation);
5. TAINTED EVIDENCE (because sister of victim tampered with victim's boots while dying she tainted evidence, thus, this shows possible different reason of crime);
6. RECORDS (because this petitioner attempts to acquire copies of the case record [clerk's record & reporter's record] and the state denies/ignores his petitions this petitioner motioned this court for the same in this application, and this respondent srtikes his attempt. [record si VITAL];
7. COMMENT ON HIS FIFTH AMENDMENT RIGHT (petitioner's main issue on state appeal was speedy trila, petitioner does recall (small English language portions) trial court's and defense counsel's comments attacking his silence.

This petitioner is a native of the country of Guatemala, lacks experienced knowledge of the english vocabulary (write/speak_), more importantly, lacks the complexity of the legalese terms, he is relying in the typing, translation & preparation of this federal § 2254 and seeks the protection of this federal court under **Haines v. Kerner** 404 U.S. 519-20, 92 SCt. 594-95, 30 LEd2d 652 (1972);...a pro-se complaint is held to less stringent than formal pleading by an attorney.

Because of the seriousness of the accusations, this petitioner PRAYS, this court takes his pleadings as a cry for JUSTICE.

DISCUSSION

This petitioner will only reply to the 3 following issues argued by respondent in it's answer, and they are as follows:

I. STATUTE OF LIMITATIONS;

II. EXHAUSTION AND PROCEDURAL DEFAULT; and

III. RECORDS

Petitioner, after replying to the 3 issues above will seek assistance from htis court to acquire the record (court clerk/reporter's record which is vital to sustain his allegations), and/or for this court to accept a protective petition in federal proceedings (instant) until state remedies are exhausted.

It would be a proper of the court's time and all parties involved to firstmsettle the above 3 issues, due that iif this petitioner is out-of-time for § 2254, then this application is moot. THIS § 2254 WAS FILED TO PRESERVE TIME LIMIT & FOR RECORDS.

I.

STATUTE OF LIMITATIONS

In state proceedings case history and revised calculations:

1. Trial	7-11-05	
2. Guilty verdict	7-14-05	
3. Timely appeal	7-15-05	
4. Appeal affirmed	7-12-06	
5. MANDATE issued	9-26-06	clock starts

6. State writ mailed*	2-02-07	130 days elapsed
returned noncompliant	4-11-07	not counting non-compliance
7. Properly filed writ	7-02-07	120 days stop.
8. Denied w/out order	11-21-07	clock starts
	total 250 days	

In federal proceedings (§ 2254 application):

1. § 2254 mailed**	1-24-08	64 days
2. returned more Postage	1-28-08	refiled. clock ends. 314 days total

II.

EXHAUSTION AND PROCEDURAL DEFAULT

In response to question twenty-two (22) in the federal petitio form concerning new claims, this respondent claims petitioner failed to raise the issue before (concerning Court of Appeals) comment on petitioner's decision not to testify), and this claim was unexhausted. While petitioner is challenging speedy trial violation in the Dallas Court of Appeals, he did not file a PDR, nor argued in the state-writ application.

In order to satisfy the exhaustion requirements of 28 U.S.C. § 2254(b)(c), a Texas prisoner must fairly,

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* Spotville v. Cain 149 F3d 374, 378 (5th cir 1998) mail box rule applies when pro-se prisoner deposits a federal petiiton in the institution mailbox it's filed.

** Fisher v. Johnson Under mail-box rule courts in this circuit treat the date a prose prisoner deposits a federal petition in the mail as the filing date.

and properly, present his claim to the court of Criminal Appeals by petition for discretionary review or state habeas corpus.

PETITIONER'S REPLY:

Without understanding the Opinion of the court of appeals, his somewhat recollection of the simple english understanding, petitioner interpreted during trila legalese sparring, unknowlegeable prison writ writers, petitioner was going blind.* FOR THE ABOVE ISSUES, TO PRESERVE STATUTE OF LIMITATIONS AND TO ACQUIRE THE COURT/RECORD (TO SUBSTANTIATE HIS GROUNDS FOR REVIEW) this petitioner filed his § 2254 application and requested copies of the record. In **Ex parte Thomas** 953 SW2d 286, 289 (Tex.Crim.App 1997); **Ex parte Brown** 662 SW2d (Tex.CrimApp) and Texas Code of Criminal Procedure art. 11.07 § 3(a); "A conviction from an appeal hs been taken is not considered to be final conviction until the mandate from the court of appeals is issued..... also, in **Carey v. Saffold** 536 U.S. 214, 220, 122SCt. 2134, 153 LEd2d 260 (200); "a state postconviction application 'remains pending' until the application has achieved final resolution through the state's postconviction procedure." In **Lawrence v. Florida** 549 U.S. ____ (2002); the limitations period is tolled from the date on which the first petition for postconviction review or other collateral relief is filed until final state court

---

* This petitioner is at the mercy of faulty ineffective attorneys, prison writ writers, and due to petitioner's limited access to law library, & his job assign;ent, it would take many many years for him to acquire the law experiences that law students acquire.

disposition of such petition...§ 2254(d)(2) ("a properly filed application for state-post-conviction or other collateral review remains pending after the state's highest court will issue its mandate or denied review, & other state avenue for relief remains open. In Texas after appeal is denied and mandate issued considered final.. See EXHIBT titled APPEAL.

III.

RECORDS

Petitioner has tried due diligently to acquire copies of the clerk record, reporter's record with discovery/exhibits, and filed his proper indigent status form.

In Watkins v. State 226 SW3d 737 (Tex.App.—Waco 2007)...an indigent is entitled a copy of the court record." See also, Griffin Indu. v. Honorable Thirteen Court of Appeals 934 SW2d 349, 353 (Tex. 1996); "our state consituttion and our rule of procedures recognized that our courts must be open to all legitimate disputes, not just those who can afford to pay the fee."

PETITIONER SEEKS AS PRO-SE LITIGANT COURT ORDER FOR RECORD.

AFFIRMATION OF RELIEF SOUGHT

Petitioner mailed his § 2254 application with "Petitioner's Memorandum Brief in Support of § 2254," by depositing it in the institutional mailbox, on 1-24-08. He cited his grounds for relief and cited his relief sought as:

1. A court order for the state trila court to produce copies of the trial clerk court record & reporter's record with all relevant exhibits & discovery;
2. An extension of time to accurately construe with the records of the trial court, an application for § 2254.

Petitioner had filed his § 2254 to preserve 1 year statute of limitations period and sought assistance from this court to acquire copies of the record, to substantiate his innocence claim due to the seriousness of the accusation.

In the alternative petitioner seeks a stay and abey federal proceedings until state remedies are exhausted. SEE ALL AXHIBITS HE HAS DUE DILIGENTLY SOUGHT RECORDS free or for a fee. STATE DENIED.

WHEREFORE, Mr. Rafael Arriaza Gonzalez, a prisoner pro-se, PRAYS this Honorable Court GRANTS relief sougth. Or what this court deems appropriate.

Respectfully submitted,

Date: 5-13-08

/s/ Rafael Arriaza Gonzalez

Rafael Arriaza Gonzalez

TDCJ#1316090

APPENDIX R

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-10871
USDC No. 3:08-CV-151

RAFAEL ARRIAZA GONZALEZ,

Petitioner-Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent – Appellee

Appeal from the United States District Court
for the Northern District of Texas

ORDER:

Rafael Arriaza Gonzalez, Texas prisoner #1316090, has applied for a certificate of appealability (COA) for an appeal from the dismissal as time barred of his application for a writ of habeas

corpus challenging his 2005 conviction of murder. Citing *Lawrence v. Florida*, 549 U.S. 327, 331-35 (2007), Gonzalez argues that his conviction became final and, thus, the limitation period commenced under 28 U.S.C. § 2244(d)(1)(A), on the date when the state appellate court issued its mandate, and not upon the expiration of the period for seeking discretionary review by the Texas Court of Criminal Appeals, as has been the rule of this circuit. *See Roberts v. Cockrell*, 319 F.3d 690, 694-95 (5th Cir. 2003). A COA is GRANTED as to the question whether *Roberts* has been overruled by *Lawrence*, and, if so, whether the habeas application was timely filed because Gonzalez's conviction became final, and thus the limitation period commenced, on the date the intermediate state appellate court issued its mandate.

/s/ Emilio M. Garza
EMILIO M. GARZA
UNITED STATES
CIRCUIT JUDGE

PETITIONER'S BRIEF

No. 10-895

In The
Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ,

Petitioner,

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. Whether there was jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal.

II. Whether the application for a writ of habeas corpus was out of time under 28 U.S.C. § 2244(d)(1) due to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 8

ARGUMENT 12

I. THE COURT OF APPEALS HAD JURISDICTION TO ISSUE THE CERTIFICATE OF APPEALABILITY AND TO ADJUDICATE THE APPEAL 13

A. The Court of Appeals Had Jurisdiction To Issue The Certificate of Appealability 14

1. All Jurisdictional Prerequisites Were Satisfied 14

2. Petitioner Satisfied Section 2253(c)(2)'s "Substantial Showing" Requirement 15

a. Petitioner made a substantial showing of a Sixth Amendment speedy trial violation 16

b. Section 2253(c)(2) is not jurisdictional 21

B. The Court Had Jurisdiction To Adjudicate The Appeal Because Section 2253(c)(3)'s Requirement That The Court "Indicate" The Qualifying Issues For Appeal Is Not Jurisdictional 25

C. Regardless Of The Court Of Appeals' Jurisdiction, This Court Has Jurisdiction To Decide The Procedural Issue 29

II. PETITIONER'S SECTION 2254 PETITION WAS TIMELY FILED 32

A. Direct Review Concluded When The Appellate Court's Mandate Issued 33

1. State Law Determines The "Conclusion of Direct Review" 33

a. The plain textual meaning incorporates state law 33

b. Precedent has employed the state-law rule 37

c. Deference to state law comports with AEDPA's purpose 40

2. If a Uniform Federal Rule Governs When Direct Review Concludes, It Should Be the Mandate 47

B. The Petition Was Timely Because The "Expiration Of Time For Seeking Review" Prong Includes The 90-Day Period For Filing A Petition For Writ of Certiorari 51

1. This Court Has Repeatedly Held That Section 2244(d)(1)(A) Includes The 90-Day Certiorari Timeframe 51

2. The *Jimenez/Clay* 90-Day Rule Applies Regardless Of Whether Discretionary Review Is Sought In The State's Highest Court 53

CONCLUSION 57

ADDENDUM

U.S. CONST. Amend. VI 1a

U.S. CONST. Amend. XIV, § 1 ..... 2a

28 U.S.C. § 2253(a) & (c) 3a

28 U.S.C. § 2254 ..... 4a

Fed. R. App. P. 22 ..... 8a

Rule 11 of the Rules Governing Habeas Corpus Cases Under Section 2254 ..... 10a

TABLE OF AUTHORITIES

CASES

Anders v. California,
386 U.S. 738 (1967) 55

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) ..... *passim*

Artuz v. Bennett,
531 U.S. 4 (2000) 6

Artuz v. Bennett,
542 U.S. 4 (2000) 37

Barefoot v. Estelle,
463 U.S. 880 (1983) 52

Barker v. Wingo,
407 U.S. 514 (1972) 17

Barron v. Howes,
No. 1:07-CV-620, 2008 WL 3539788 (W.D. Mich. Aug. 12, 2008) 56

Beckner v. Friendly Ice Cream Corp.,
No. 219047, 2004 WL 1662290 (Va. Cir. Ct. 2004) 47

Bell v. Maryland,
378 U.S. 226 (1964) 52

Beyer v. Litscher,
306 F.3d 504 (7th Cir. 2002) 27

Bowles v. Russell,
551 U.S. 205 (2007) 24

Brigham v. State,
950 So. 2d 1274 (Fla. Dist. Ct. App. 2007) 43

Brown v. Texas,
443 U.S. 47 (1979) 54

Buie v. McAdory,
322 F.3d 980 (7th Cir. 2003) 16, 24

Calderon v. Thompson,
523 U.S. 538 (1998) 48

Carey v. Saffold,
536 U.S. 214 (2002) 36, 37, 39, 45

Casias v. United States,
337 F.2d 354 (10th Cir. 1964) 49

Caspari v. Bohlen,
510 U.S. 383 (1994) 41, 52, 56

City of Milwaukee v. Illinois and Michigan,
451 U.S. 304 (1981) 35

Clay v. United States,
537 U.S. 522 (2003) ..... *passim*

Commonwealth v. Johnson,
841 A.2d 136 (Pa. Super. Ct. 2003) 44

Crowell v. Commonwealth,
225 N.E.2d 330 (Mass. 1967) 44

Cutter v. Wilkinson,
544 U.S. 709 (2005) 29

Day v. Crosby,
391 F.3d 1192 (11th Cir. 2004) 31

Day v. McDonough,
547 U.S. 198 (2006) 24, 31

Deering Milliken, Inc. v. Federal Trade Comm'n,
647 F.2d 1124 (D.C. Cir. 1978) 48

Dodd v. United States,
545 U.S. 353 (2005) 33

Doggett v. United States,
505 U.S. 647 (1992) 17, 18, 19, 20

Dolan v. United States,
130 S. Ct. 2533 (2010) 23, 24, 28

Duncan v. Walker,
533 U.S. 167 (2001) 41, 42, 46

Ex parte Hargett,
772 So. 2d 481 (Ala. Crim. App. 1999) 43

Ex parte Johnson,
12 S.W.3d 472 (Tex. Crim. App. 2000) 5, 33

Gillis v. F & A Enterprises,
934 P.2d 1253 (Wyo. 1997) 46

Gonzalez v. State,
No. 05-05-01140-CR, 2006 WL 1900888
(Tex. App. July 12, 2006) 5, 19

Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396 (2010) 40

Granberry v. Greer, 481 U.S. 129 (1987) 24

Griffith v. Kentucky, 479 U.S. 314 (1987) 52

Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197 (2011) 21, 23, 27

Hickey v. Riera, 774 N.E.2d 1 (Ill. App. Ct. 2001) 46

Hines v. Miller, 318 F.3d 157 (2d Cir. 2003) 29

Holn v. United States, 524 U.S. 236 (1998) 29, 54

Holland v. Florida, 130 S. Ct. 2549 (2010) ..... *passim*

Holland v. Florida, 539 F.3d 1334 (11th Cir. 2008) 31

Horton v. Wilkes, 302 S.E.2d 94 (Ga. 1983) 43

In re Long, 984 S.W.2d 623 (Tex. 1999) 33

Jimenez v. Quarterman, 555 U.S. 113 (2009) ..... *passim*

Johnson v. Bechtel Assoc. Professional Corp.,
801 F.2d 412 (D.C. Cir. 1986) 48

Jones v. State,
602 So. 2d 606 (Fla. Dist. Ct. App. 1992) 43

Lawrence v. Florida,
421 F.3d 1221 (11th Cir. 2005) 31

Lawrence v. Florida,
549 U.S. 327 (2007) 7, 31, 36, 48

Lindh v. Murphy,
521 U.S. 320 (1997) 10

Losh v. Fabian,
592 F.3d 820 (8th Cir. 2010) 41

Metlakatla Indian Cmty. Annette Island Reserve v. Egan,
363 U.S. 555 (1960) 54

Miller-El v. Cockrell,
537 U.S. 322 (2003) ..... *passim*

Nash v. Florida Indus. Comm'n,
389 U.S. 235 (1967) 54

National Archives & Records Admin. v. Favish,
541 U.S. 157 (2004) 26

Nix v. Secretary for the Dep't of Corrs.,
393 F.3d 1235 (11th Cir. 2004), *cert. denied*,
545 U.S. 1114 (2005) 55

Pace v. DiGuglielmo,
544 U.S. 408 (2005) 37

Panetti v. Quarterman,
551 U.S. 930 (2007) 2

Peguero v. United States,
526 U.S. 23 (1999) 31

Phelps v. Alameda,
366 F.3d 722 (9th Cir. 2004) 16, 28

Porterfield v. Bell,
258 F.3d 484 (6th Cir. 2001) 16

Ransom v. FIA Card Servs., N.A.,
131 S. Ct. 716 (2011) 39

Reed Elsevier, Inc. v. Muchnick,
130 S. Ct. 1237 (2010) 22, 23, 24

Rhines v. Weber,
544 U.S. 269 (2005) 42, 46

Richfield Oil Corp. v. State Bd. of Equalization,
329 U.S. 69 (1946) 36

Roberts v. Cockrell,
319 F.3d 690 (5th Cir. 2003) ..... *passim*

Rodriguez v. Scillia,
193 F.3d 913 (7th Cir. 1999) 28

Rowland v. California Men's Colony,
506 U.S. 194 (1993) 26

Russello v. United States,
464 U.S. 16 (1983) 22

Sanders v. State,
791 N.W.2d 126 (Minn. 2010) 46

Sixta v. Thaler,
615 F.3d 569 (5th Cir. 2010) 29

Slack v. McDaniel,
529 U.S. 473 (2000) ..... *passim*

Sleeper v. Warden, N.H. State Prison,
920 A.2d 1200 (2007) 44

Smith v. Barry,
502 U.S. 244 (1992) 23

Snook v. Wood,
89 F.3d 605 (9th Cir. 1996) 55, 56

Soto v. United States,
185 F.3d 48 (2d Cir. 1999) 16

Stern v. Marshall,
131 S. Ct. 2594 (2011) 21

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998) 45

Teague v. Lane,
489 U.S. 288 (1989) 41, 56

Tennard v. Dretke,
542 U.S. 274 (2004) 20

Torres v. Oakland Scavenger Co.,
487 U.S. 312 (1988) 23

Trest v. Cain,
522 U.S. 87 (1997) 24

United States v. Cepero,
224 F.3d 256 (3d Cir. 2000) (en banc) 16

United States v. Cook,
705 F.2d 350 (9th Cir. 1983) 49

United States v. Granza,
427 F.2d 184 (5th Cir. 1970) 49

United States v. Gross,
614 F.2d 365 (3d Cir. 1990) 49

United States v. Harms,
371 F.3d 1208 (10th Cir. 2004) 25

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 28

United States v. Montalvo-Murillo,
495 U.S. 711 (1990) 28

United States v. Reyes,
49 F.3d 63 (2d Cir. 1995) 49

United States v. Spector,
888 F.2d 583 (8th Cir. 1989) 49

Wall v. Kholi,
131 S. Ct. 1278 (2011) 34, 38

Wheeler v. Jones,
226 F.3d 656 (6th Cir. 2000) 41

Young v. United States,
124 F.3d 794 (7th Cir. 1997) 16

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 22

CONSTITUTION AND STATUTES

U.S. Const. Amend. VI ..... *passim*

U.S. Const. Amend. XIV, § 1 ..... 4, 6, 17

18 U.S.C.
§ 1361 49

28 U.S.C.
§ 1254(1) 2
§ 1257(a) 53
§ 1291 15
§ 1651(a) 54
§ 2244(d)(1) 3, 35, 43, 48
§ 2244(d)(1)(A) ..... *passim*
§ 2244(d)(2) ..... *passim*
§ 2253(a) 15
§ 2253(c) 9, 29
§ 2253(c)(1) ..... *passim*
§ 2253(c)(2) ..... *passim*
§ 2253(c)(3) 3, 25
§ 2255 ..... 33, 51
§ 2263(a) 34

42 U.S.C.
§ 2000e-5(f)(3) 23

Ariz. Rev. Stat. Ann. 13-4232(a)(1) 43

Md. Code Ann.
§ 12-204(4) 56

Minn. Stat.
§ 590.01, subdiv. 1 44

Neb. Rev. Stat.
§ 24-1107 39

Nev. Rev. Stat.
§ 34.726(1) 44

Pa. Consol. Stat.
§ 9545 44

Tex. Code Crim. P. Article 11.07
§ 3(b) 6

Utah Code
§ 78B-9-106 44

Wis. Stat.
§ 974.06 44

W. Va. Stat.
§ 53-4A-1 44

RULES

Fed. R. App. P. 3 23

Fed. R. App. P. 3(c) 23

Fed. R. App. P. 4 23

Fed. R. App. P. 4(a) 15

Fed. R. App. P. 4(a)(2) 7, 15

Fed. R. App. P. 22 ..... 7, 18

Fed. R. App. P. 22(b) 16

Fed. R. App. P. 22(b)(2) 15

Fed. R. App. P. 27(c) 24

Fed. R. Civ. P. 8(a) 22

Fed. R. Civ. P. 12(b)(6) 22

Fed. R. Crim. P. 33 49

Rule 11 of the Rules Governing Habeas Corpus Cases Under Section 2254 ..... 7, 15

Sup. Ct. R. 13.3 34

5th Cir. R. 27.2 24

6th Cir. R. 27(f) 24

Ca. R. Ct. 8.304 56

Del. Super. Ct. R. Crim. P. 61(b)(4) 43

Ga. Ct. App. R. 8.500 39

Ind. R. App. P. 57(C)(1) 39

N.J. Ct. R. 3:22-3 44

Tenn. R. App. P. 11 39

Tex. R. App. P. 18.1 ..... 5, 45

Tex. R. App. P. 73.1(c) 6

Tex. R. Crim. P. 11.07 5

Tex. R. Crim. P. Art. 11.07(3) 44

Tex. R. Crim. P. Art. 11.07(3)(b) 6

Va. S. Ct. R. 5A:31 ..... 40, 47

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S. Rep. No. 226, 98th Cong., 1st Sess. (Sept. 14, 1983) 49

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Webster's Third New Int'l Dictionary (1993) 26, 34

In The
Supreme Court of the United States

No. 10-895

RAFAEL ARRIAZA GONZALEZ,

Petitioner,

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 623 F.3d 222. The district court's opinion (Pet. App. 9a-10a) and the magistrate judge's report and recommendation (Pet. App. 11a-21a) are not reported.

JURISDICTION

The court of appeals entered its judgment on October 6, 2010. Pet. App. 1a. A timely petition for a writ of certiorari was filed on January 4, 2011, and

the petition was granted by this Court on June 13, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The relevant constitutional and statutory provisions and court rules are reproduced at Pet. App. 22a and Addendum, *infra*, 1a-10a.

STATEMENT OF THE CASE

1. Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to "further the principles of comity, finality, and federalism," *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), "without undermining basic habeas corpus principles," *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010). Accordingly, Congress crafted AEDPA's provisions in a manner that preserved the historic "importance of the Great Writ," *id.*, in ensuring that the federal courthouse "doors" remain open to "habeas petitioners seeking" in a timely manner their one opportunity for federal review of their constitutional claims, *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007). *See also* H.R. Rep. No. 23, 104th Cong., 1st Sess. 9 (Feb. 9, 1995) ("This reform will curb the lengthy delays in filings that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner.").

As relevant here, AEDPA provides that, if a federal habeas petition has been dismissed in district court, "an appeal may not be taken to the court of appeals" "[u]nless a circuit justice or judge issues a

certificate of appealability." 28 U.S.C. § 2253(c)(1). The statute further states that "[a] certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Finally, AEDPA instructs that, when issuing a certificate of appealability, the judge or circuit justice "shall indicate which specific issue or issues satisfy the showing required by" Section 2253(c)(2). 28 U.S.C. § 2253(c)(3).

AEDPA separately imposes a one-year "period of limitation" for state prisoners to apply for a federal writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The limitation period begins running when the judgment of conviction becomes "final," which (as relevant here) is defined as "the latest of" "the conclusion of direct review or the expiration of the time for seeking such review." *Id.* That limitation period is tolled for "the time during which a properly filed application for State post-conviction or other collateral review * * * is pending." 28 U.S.C. § 2244(d)(2).

2. On June 2, 1995, Robert Velasquez was killed near an apartment complex in Irving, Texas. J.A. 107. Two automobiles were seen at the scene of the shooting. Witnesses said petitioner, Rafael Arriaza Gonzalez, was in one car, and two other Hispanic males were in the other. J.A. 275-276.

Petitioner was indicted for murder on June 28, 1995. J.A. 107. Officers attempted to execute a warrant for his arrest at his last known addresses. *Id.* When they did not find petitioner, the officers made no further effort to locate him. J.A. 43-45.

Approximately six weeks later, the victim's sister, Luz Del Cid, informed the investigating

officer, Detective Harold Renfroe, that petitioner was in Marajuma, a small village in his native Guatemala. J.A. 47. Petitioner had been there since at least the time of the murder. He had no knowledge that he had been indicted, and it is undisputed that he was making no attempt to evade detection. J.A. 115. Indeed, while living in Marajuma, he sought a visa from the United States Embassy in Guatemala to return to the United States. *Id.*

On August 3, 1995, Detective Renfroe informed embassy officials that petitioner had been located in Guatemala. But neither he nor anyone else involved in the investigation took any further steps to have petitioner apprehended. J.A. 47, 49.

Six years later, the Dallas District Attorney's Office began extradition proceedings. Petitioner was extradited in July 2004. J.A. 110. His trial commenced on July 11, 2005, almost ten years after his indictment. J.A. 111.

3. At trial, petitioner moved for dismissal on the ground that the prosecution's unjustified ten-year delay in apprehending him and bringing him to trial violated the Sixth and Fourteenth Amendments' guarantee of a "speedy" trial. U.S. Const., Amends. VI & XIV. Petitioner further contended that, because he had been unaware of the charges against him for much of that time, the inordinate delay in prosecution substantially prejudiced his ability to investigate the charges effectively or to mount a defense at trial. J.A. 26. The trial court denied the motion to dismiss. J.A. 111. The identity of the shooter (petitioner or one of the other Hispanic males at the scene) was the central issue at trial, and the

proof turned critically on witnesses' memories of events that had occurred a decade earlier. J.A. 26, 68, 265.

Petitioner was convicted and sentenced to thirty years' imprisonment. Pet. App. 2a. His court-appointed counsel filed a timely appeal to the Texas intermediate court of appeals, raising, *inter alia*, his speedy trial claim. J.A. 213. The court of appeals affirmed his conviction on July 12, 2006. *Gonzalez v. State*, No. 05-05-01140-CR, 2006 WL 1900888 (Tex. App. July 12, 2006).

Petitioner's counsel then terminated his representation without filing a petition for discretionary review with the Texas Court of Criminal Appeals. Pet. App. 2a; J.A. 325. The time for filing that petition expired on August 11, 2006. Pet. App. 4a. The intermediate court of appeals issued its mandate on September 26, 2006, *id.* at 2a, which concluded direct review of his conviction in the state court system, *see* Tex. R. App. P. 18.1. *See also Ex parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000). Prior to that date, any application for state postconviction relief would have been premature. *Johnson*, 12 S.W.3d at 473 ("This Court does not have jurisdiction to consider an application for writ of habeas corpus pursuant to Art. 11.07 until the felony judgment from which relief is sought becomes final.").

4. On July 19, 2007, petitioner filed *pro se* in Texas state court a timely and proper petition for a writ of habeas corpus, Tex. R. Crim. P. Art. 11.07. Pet. App. 2a. Petitioner raised, *inter alia*, his constitutional speedy trial claim. J.A. 88, 106. The state court recommended that his petition be denied,

J.A. 131, and forwarded the petition to the Texas Court of Criminal Appeals, *see* Tex. Code Crim. P. Art. 11.07 § 3(b). That court denied the petition on the merits on November 21, 2007. J.A. 133.[1]

5. On January 24, 2008, petitioner filed *pro se* a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, raising, as relevant here, his Sixth and Fourteenth Amendment speedy trial claim. Pet. App. 2a; J.A. 134.

Excluding the time during which his properly filed state habeas petition was pending, 28 U.S.C. § 2244(d)(2), petitioner's federal habeas petition was filed 360 days after the state court of appeals issued its mandate, and 346 days after the time period for filing a certiorari petition on direct review expired. The filing, however, was 406 days after expiration of the time to seek discretionary review by the Texas Court of Criminal Appeals.

A magistrate judge recommended that the petition be dismissed as untimely. Pet. App. 11a-21a. Petitioner timely filed objections, *id.* at 10a, but the district court adopted the recommendation and entered an order dismissing the petition as untimely, *id.* at 9a-10a. In so ruling, the court acknowledged

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[1] Petitioner's first state habeas petition, which was submitted on February 8, 2007, was dismissed as improperly filed because petitioner stated his grounds for relief in his brief instead of in the required form. Pet. App. 2a, 4a n.2; *see* Tex. R. App. P. 73.1(c). That petition thus did not toll the running of AEDPA's limitation period. *See Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

that its decision would cause AEDPA's one-year limitation period to run for almost seven weeks before state law would deem the conviction final and permit the filing of an application for postconviction relief. *Id.* at 10a.

6. Petitioner filed a timely notice of appeal on September 4, 2008. J.A. 155. That filing also requested a certificate of appealability from the district court. *See* Fed. Rules Governing Section 2254 Cases ("Habeas Rules"); Fed. R. App. P. 4(a)(2). The district court rejected that request. J.A. 164.

Petitioner then filed a request for a certificate of appealability in the court of appeals, in accordance with Federal Rule of Appellate Procedure 22 and Habeas Rule 11. J.A. 165. Petitioner raised his speedy trial claim in his brief in support of his application for a certificate of appealability, J.A. 178, including copies of the state appellate court's opinion on the speedy trial claim, J.A. 190, his state appellate brief, J.A. 208, relevant excerpts from the state speedy trial hearing, J.A. 235, his objections to the magistrate judge's recommendation that his federal habeas petition be denied, J.A. 327, and his reply to the State's response to his federal habeas petition, J.A. 337. The district court then submitted its full record, including petitioner's habeas petition, to the court of appeals for its consideration in conjunction with petitioner's application for a certificate of appealability. J.A. 7.

Judge Garza granted the certificate of appealability, identifying as a qualifying issue the question "whether *Roberts* [*v. Cockrell*, 319 F.3d 690 (5th Cir. 2003)] has been overruled by *Lawrence* [*v. Florida*, 549 U.S. 327 (2007)] and, if so, whether

[petitioner's] habeas application was timely filed." J.A. 347.

7. The court of appeals then affirmed dismissal of the petition as untimely. Pet. App. 1a-8a. The court held that "state court definitions" cannot "determine finality" under 28 U.S.C. § 2244(d)(1)(A), and thus a "uniform federal rule" had to be applied to decide when "the conclusion of direct review" occurred, since petitioner did not seek discretionary review of his conviction in the Texas Court of Criminal Appeals. Pet. App. 8a.

The court of appeals further held that, under Section 2244(d)(1)(A), the uniform federal rule for determining when direct review becomes final would be the expiration of the time for seeking discretionary review from the State's highest court. Pet. App. 4a. As required by circuit precedent, the court also excluded from its calculation the ninety-day period for seeking certiorari review in this Court. Pet. App. 4a; *see Roberts*, 319 F.3d at 693 & n.14.

SUMMARY OF ARGUMENT

I. The court of appeals had jurisdiction to issue a certificate of appealability and to adjudicate this case. Petitioner properly invoked the court's jurisdiction through the timely filing of a notice of appeal and applications for a certificate of appealability. A certificate of appealability, moreover, was issued, thereby satisfying AEDPA's jurisdictional precondition to appeal. 28 U.S.C. § 2253(c)(1).

Section 2253 separately requires that the habeas petitioner make a "substantial showing of the denial of a constitutional right" for a certificate to issue. 28

U.S.C. § 2253(c)(2). That requirement does not affect the court's jurisdiction either to issue a certificate of appealability or to decide the underlying appeal. Section 2253(c)(2) lacks the express references to the courts' power to act that Congress commonly includes when it intends a provision to have jurisdictional consequence and, indeed, that were included in the neighboring provision (subsection 2253(c)(1)) but were tellingly omitted from subsection (c)(2). Nor does subsection (c)(2)'s character warrant jurisdictional status, given its emphasis on the threshold legal viability of the underlying constitutional claim. Such merits-based showings are not traditionally accorded jurisdictional significance.

But this Court need not even decide that question in this case because, jurisdictional or not, petitioner's constitutional speedy trial claim amply met the "substantial showing" requirement. Petitioner documented what appears to be the longest gap between indictment and trial in any speedy trial case that has ever come before this Court. That gives rise to a strong presumption of prejudice. Combined with the admissions of key state officials that much of the delay was due to their self-chosen inactivity, and the fact that the trial turned entirely on the time-strained recall of witnesses, petitioner stated a valid and reasonably debatable constitutional claim.

Finally, the court of appeals' failure to recite petitioner's substantial constitutional claim in the certificate of appealability is not jurisdictional either. AEDPA requires only that the court "indicate" the underlying constitutional question supporting

issuance of the certificate. 28 U.S.C. § 2253(c)(3). Given that a certificate was issued in this case on the basis of a public record that documented a substantial constitutional question, any oversight in the certificate's written content is not a misstep of jurisdictional consequence. Nothing in AEDPA's text suggests that, when diligent habeas petitioners have made the required statutory showing and have done everything within their power to timely present their claims in federal court, Congress intended a court's drafting errors to deprive them of their first—and likely only—opportunity for federal habeas review of substantial constitutional claims.

II. This Court has lamented that, "in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Court interpretations of AEDPA's text should not make that problem worse. But that is what the court of appeals did here. Congress, quite straightforwardly and with uncommon (for AEDPA) silk-purse clarity, directed that the one-year limitation period for filing federal habeas petitions does not commence until "the latest of" two dates: "the conclusion of direct review" of the state judgment of conviction, or "the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

The moment of Texas's "conclusion of direct review" of petitioner's judgment of conviction is a known date: September 26, 2006, the day the intermediate appellate court's mandate issued. The expiration of time for seeking further direct review is also readily calculable: August 11, 2006 for review in the Texas Court of Criminal Appeals, and October 10,

2006 for review in this Court. And a calendar easily answers which of those dates is "latest."

Rather than read AEDPA as written, however, the court of appeals ruled that the *earliest* date controlled. Pushing aside the plain meaning of the governing text, the court held that AEDPA superimposes a homogenized federal date of finality that means exclusively the "expiration of time for seeking * * * review" in the next state court. In the court's and respondent's view, when a defendant does not seek discretionary direct review in the State's highest court, AEDPA's "conclusion of direct review" prong evaporates.

That is not how this Court reads statutes. The "latest of" does not mean the earliest of, and two disjunctive timeframes—(i) the conclusion of direct review, or (ii) the expiration of time to seek review—cannot be judicially melded into a single inquiry. Whether or not a defendant seeks discretionary review from a State's highest court, his direct review process still has a conclusion. And if the date that direct review concludes is later than the expiration of time for seeking further review, AEDPA plainly says that the later date *controls*; it certainly cannot be ignored.

That is particularly true because Congress crafted AEDPA's timing provision to be respectful of the States' judicial processes and to give them a full opportunity to complete their own review before the federal habeas process intervenes. The court of appeals' scheme, however, casts state processes aside in favor of a standardized federal model. Still worse, the court's artificially crafted endpoint for state direct review starts the federal limitation period running at

a time when state law still forbids the prisoner from filing for state postconviction review. That puts state and federal law at cross-purposes, confounding Congress's aims of promoting federalism and comity.

ARGUMENT

Congress enacted AEDPA to promote federalism principles while ensuring that the Great Writ continues to provide diligent habeas petitioners one full and fair opportunity for federal judicial review of their constitutional claims. The Fifth Circuit's decision upends both of those goals. Under the court of appeals' decision, AEDPA pays no heed to the States' own laws governing when their own direct review processes conclude and when their own avenues for postconviction relief open to prisoners. Moreover, the court's disregard for state processes locks many state prisoners in a procedural vise, with AEDPA's timing requirements demanding that they seek state postconviction review at a time when state law forbids it.

To make matters worse, respondent now argues that AEDPA slams the courthouse doors shut on petitioner's first and only chance for federal consideration of a substantial constitutional speedy trial claim not because of anything petitioner did, but because of a federal court's mistake in drafting his certificate of appealability. While AEDPA tightened the rules for federal habeas review, it did not squeeze all common sense out of the law.

I. THE COURT OF APPEALS HAD JURISDICTION TO ISSUE THE CERTIFICATE OF APPEALABILITY AND TO ADJUDICATE THE APPEAL

AEDPA's requirement that a certificate of appealability issue, 28 U.S.C. § 2253(c)(1), is a jurisdictional prerequisite to appellate review. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court addressed how the certificate of appealability requirement should apply when, as here, a district court denies a habeas petition solely on procedural grounds, without addressing the underlying constitutional claims. This Court held that, in those circumstances, a certificate "should issue (and an appeal of the district court's order may be taken) if the prisoner shows * * * that jurists of reason" both (i) "would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (ii) "would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478.

In this case, the jurisdictional requirement of Section 2253(c)(1) was satisfied when the certificate of appealability issued. However, while the court's certificate identified the procedural question meriting appellate review (timeliness), it did not expressly identify the substantive constitutional claim that supported its issuance, as *Slack* requires. That omission was a non-jurisdictional misstep by the appellate court over which petitioner had no control. While that error might have been subject to challenge in petitioner's merits appeal or in a separate government appeal from the certificate's issuance, it

was waived by respondent when not raised below. *See* Cert. Opp. 16-17 (admitting failure to object to certificate). Accordingly, because issuance of the certificate vested the court of appeals with jurisdiction under Section 2253(c)(1), gaps in the content of the certificate did not strip the court of appeals of the power to act.

A. The Court Of Appeals Had Jurisdiction To Issue The Certificate Of Appealability

1. All Jurisdictional Prerequisites Were Satisfied

The plain text of AEDPA Section 2253(c)(1) makes the issuance of a certificate of appealability a jurisdictional precondition to appellate review because it says that "an appeal may not be taken" without it. 28 U.S.C. § 2253(c)(1); *see Miller-El*, 537 U.S. at 335-336. When Congress so "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional," this Court will give it the intended jurisdictional effect. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006).

That jurisdictional prerequisite was met in this case because a circuit judge issued petitioner a certificate of appealability. J.A. 346-347; Pet. App. 3a. The court of appeals, moreover, had jurisdiction to enter that order. Section 2253(c)(1) authorizes a "circuit justice or judge [to] issue[] a certificate of appealability." 28 U.S.C. § 2253(c)(1).

In addition, petitioner properly invoked the appellate court's jurisdiction. He filed a timely notice of appeal on September 8, 2008, within thirty days of the district court's order dismissing his habeas

petition. 28 U.S.C. §§ 1291, 2253(a); Fed. R. App. P. 4(a); Habeas Rule 11(b).

In addition, when the district court denied his request for a certificate of appealability, J.A. 162-164, petitioner timely renewed his request for a certificate with the Fifth Circuit 23 days after the district court's denial. *See* Habeas Rule 11; J.A. 165-166. The court of appeals thus had jurisdiction to issue the certificate of appealability, and issuance of that certificate, in turn, vested the court with jurisdiction to adjudicate the appeal.[2]

2. Petitioner Satisfied Section 2253(c)(2)'s "Substantial Showing" Requirement

Section 2253(c)(2) of AEDPA separately provides that a "certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court did not address in *Miller-El* whether that "substantial showing" requirement was jurisdictional. Nor need the Court do so here because, even if it were, petitioner's application for a certificate of appealability met that standard by stating a substantial constitutional speedy trial claim. In any event, AEDPA's language and

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[2] Petitioner's application in the district court for a certificate of appealability had no adverse effect on the notice of appeal. Indeed, under the federal appellate rules, a request for issuance of a certificate of appealability is embedded in every notice of appeal. Fed. R. App. P. 22(b)(2). Beyond that, Federal Rule of Appellate Procedure 4(a)(2) provides that the notice of appeal took effect upon the district court's disposition of the post-order motion.

structure do not make the "substantial showing" requirement jurisdictional, as every court of appeals to address the issue, save one, has recognized.[3]

a. Petitioner made a substantial showing of a Sixth Amendment speedy trial violation

There is no serious dispute that, with respect to the procedural question identified in the certificate of appealability, petitioner made a "substantial showing" that reasonable jurists could dispute whether his federal petition was time-barred, given that the law in multiple federal circuits would have found his petition to be timely. *See* Pet. 11-31.

Petitioner's application for a certificate of appealability, his petition for habeas corpus, the numerous record materials attached, and the other documents submitted to the Fifth Circuit in conjunction with the certificate of appealability determination, Fed. R. App. P. 22(b), likewise "show[ed], at least, that jurists of reason would find it debatable" whether his petition "states a valid claim of the denial of [his] constitutional right" to a speedy trial, *Slack*, 529 U.S. at 478. *See also Miller-El*, 537 U.S. at 336 ("The COA determination under § 2253(c)

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[3] *Compare Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997) (nonjurisdictional); *Buie v. McAdory*, 322 F.3d 980, 981-982 (7th Cir. 2003) (same); *Soto v. United States*, 185 F.3d 48, 51-52 (2d Cir. 1999) (same); *Porterfield v. Bell*, 258 F.3d 484, 485 (6th Cir. 2001) (same); *Phelps v. Alameda*, 366 F.3d 722, 726 (9th Cir. 2004) (same); *with United States v. Cepero*, 224 F.3d 256, 260, 267 (3d Cir. 2000) (en banc) (jurisdictional).

requires an overview of the claims in the habeas petition and a general assessment of their merits.").

In *Doggett v. United States*, 505 U.S. 647 (1992), this Court identified four factors to be weighed in evaluating a speedy trial claim under the Sixth Amendment: (1) "whether delay before trial was uncommonly long," (2) "whether the government or the criminal defendant is more to blame for that delay," (3) "whether, in due course, the defendant asserted his right to a speedy trial," and (4) "whether he suffered prejudice as the delay's result," *id.* at 651 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (Fourteenth Amendment speedy trial claim)). Petitioner "state[d]" a reasonably debatable claim that satisfied the *Doggett* test or that "at least" "deserve[d] encouragement to proceed further." *Slack*, 529 U.S. at 484.

First, petitioner showed that ten years passed between his indictment and trial, an "extraordinary" length of time that far surpasses this Court's one-year threshold for "presumptively prejudicial" delay. *Doggett*, 505 U.S. at 652 & n.1; *id.* at 658 (delay of more than one year "generally sufficient to trigger judicial review"); *Barker*, 407 U.S. at 533 (five years was "extraordinary" delay). Because "the presumption that pretrial delay has prejudiced the accused intensifies over time," *Doggett*, 505 U.S. at 652, petitioner's showing of a ten-year delay—which appears to be longer than this Court has ever encountered in a constitutional speedy trial claim—by itself states a substantial showing of a constitutional violation.

Second, petitioner showed that it is reasonably debatable whether the State bears the greater

responsibility for that delay. Time and again, Detective Renfroe admitted that, for five years, he "never followed up" on information he possessed about petitioner's location. J.A. 53-54, 60 ("Q: You never followed up with them [the U.S. Embassy]? A: No. Q: Did you ever consider Interpol? A: No. * * * I just didn't do it." * * * Q: Did you ever contact anyone I guess regarding any procedures you would have to take? A: No. Q: You just had one fax and one phone call. A: Yes, sir. Q: And then after that, in '96, it went unmonitored, correct? A: Yes. * * * Q: After that, between 1996, March 6th, 1996 and March 30th, 2001, did you do anything to try to find the defendant? A: No. Q: Did you ever attempt to follow up to see if anyone had taken any action on the information you provided through [Luz Del Cid]? A: No. Q: If Guatemala was looking for him, anything of that sort? A: No. Q: And you didn't give any information to the Dallas Sheriff's Office that he was in Guatemala, correct? A: No. Q: Did you give any information to the DA? A: No."). Because the Constitution's "toleration of such negligence varies inversely with its protractedness," *Doggett*, 505 U.S. at 657, petitioner stated a reasonably debatable speedy trial claim under the Constitution.[4]

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[4] The state trial court record, including the transcript from petitioner's speedy trial hearing, was provided to the Fifth Circuit in accordance with Federal Rule of Appellate Procedure 22, and thus was before the court when it considered the petition for a certificate of appealability. J.A. 11. Excerpts were also attached to petitioner's application for a certificate. J.A. 235-252.

Third, it is reasonably debatable that petitioner timely asserted his claim by moving to dismiss his indictment on March 14, 2005. J.A. 14-28. Petitioner could not have been expected to raise his objection for the first six years following indictment when he was unaware of the arrest warrant against him. *See Gonzalez v. State*, No. 05-05-01140-CR, 2006 WL 1900888, at *7 (Tex. Ct. App. July 12, 2006). Even then, petitioner had no capacity to raise the claim until after he was extradited and thus both within the jurisdiction of the Texas court and provided an attorney to make the motion. Moreover, petitioner did not know of the extent of the government's negligence until he received Detective Renfroe's notes on March 7, 2005 documenting that, by August 1995, the detective had already acquired the name of petitioner's village in Guatemala and received credible intelligence that petitioner was there. J.A. 25.

Finally, because the government's case turned critically on the testimony of individual witnesses, the delay was far more prejudicial than likely would have been in a case with some forensic evidence connecting the defendant to the crime. The "'most serious'" form of prejudice is "'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence * * * 'because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *Doggett*, 505 U.S. at 654 (alteration in original) (quoting *Barker*, 407 U.S. at 532). Here, there was nothing to link petitioner to the shooting—no gun, no identifying forensic analysis, no cameras or objective evidence of his presence—just the time-affected recall of witnesses. *See* J.A. 68.

This Court, moreover, has long recognized that the prejudice prong must be applied circumspectly. "[I]mpairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Doggett*, 505 U.S. at 655 (quoting *Barker*, 407 U.S. at 532). Accordingly, "affirmative proof of particularized prejudice is not essential to every speedy trial claim," *Doggett*, 505 U.S. at 655, because defendants have no realistic capacity to prove what witnesses have forgotten.

Given that commonsensical approach to the prejudice showing, the evidence of adverse impact that petitioner documented, combined with the fact that this case turned entirely on witness memory, together crossed the *Slack* "reasonably debatable" threshold. After all, the test at this juncture is not whether petitioner proved an actual violation of his constitutional rights, or even whether it is more likely than not that he will prevail on his claim in habeas. The question is only whether the petitioner "state[d]" a claim that is "debatable." *Slack*, 529 U.S. at 478. As long as "reasonable jurists could debate" the issue, or the issues presented "were adequate to deserve encouragement to proceed further," Section 2253(c)(2) is satisfied. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (internal quotations omitted).

That standard was met based on the strong presumption of prejudice arising from the unprecedented length of the delay, the record evidence of negligence from the State's own detective, and the inherently significant impact of delay on a trial that turned entirely on witness recall.

b. Section 2253(c)(2) is not jurisdictional

The court of appeals' jurisdiction to issue the certificate of appealability was secure for the additional reason that the "substantial showing" requirement is not jurisdictional.

"'Jurisdiction,' this Court has observed, "'is a word of many, too many, meanings.'" *Arbaugh*, 546 U.S. at 510 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). That is a problem, this Court has warned, because the over-labeling of statutory requirements as jurisdictional can have "drastic" consequences. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). The enforcement of statutory criteria as jurisdictional "alters the normal operation of our adversarial system" by compelling the courts to raise an issue *sua sponte*. *Id.* It can also "result in the waste of judicial resources and may unfairly prejudice litigants" because a disappointed litigant can upend "months of work on the part of the attorneys and the courts" by successfully challenging jurisdiction at any later stage. *Id.*

Accordingly, in determining whether Section 2253(c)(2)'s "substantial showing" requirement is jurisdictional, this Court applies a "readily administrable bright line" test that requires Congress to "clearly state[] that a threshold limitation on a statute's scope shall count as jurisdictional." *Arbaugh*, 546 U.S. at 515-516. Where "Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516; *see Stern v. Marshall*, 131 S. Ct. 2594, 2607 (2011) ("[W]e are

not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such.").

Section 2253(c)(2) contains no express jurisdictional reference and lacks the indicia commonly associated with jurisdictional elements.

First, in sharp contrast to Section 2253(c)(1)'s express reference to the ability of an appeal to "be taken," Section 2253(c)(2) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [appeals] courts." *Arbaugh*, 546 U.S. at 515. Congress's selective inclusion and omission of jurisdictional language in the two provisions must be given effect. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Instead, subsection (c)(2) speaks in terms of what a petitioner must "show[]," which is more analogous to the nonjurisdictional pleading requirements in Federal Rules of Civil Procedure 8(a) and 12(b)(6), or the pre-litigation registration requirement at issue in *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245 (2010). A statutory requirement that "requires a party to take some action before filing a[n] [appeal]," "says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims." *Id.* at 1245-1246; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (Title VII's EEOC filing requirement is nonjurisdictional).

Indeed, the almost complete overlap in content between the "substantial showing" requirement and the ultimate merits of the appeal—the difference is only one of degree of proof—strongly reinforces subsection(c)(2)'s non-jurisdictional character. *See Reed*, 130 S. Ct. at 1246 ("[T]he jurisdictional analysis must focus on the 'legal character' of the requirement.") (quoting *Zipes*, 455 U.S. at 395).

To be sure, Section 2253(c)(2) cross-references subsection (c)(1)'s jurisdictional requirement. But the same interrelationship arises with notices of appeal and their specified content. *See* Fed. R. App. P. 3 & 4. What is jurisdictionally critical is that a notice of appeal with the bare minimum of identifying information be timely filed. Other components, while required by rule, *see* Fed. R. App. P. 3(c), can be omitted without jurisdictional consequence. *See, e.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-317 (1988) (notice of appeal vests jurisdiction if it is "the functional equivalent of what the rule requires" and is therefore jurisdictionally sufficient); *accord Smith v. Barry*, 502 U.S. 244, 248 (1992). Similarly, *Arbaugh* noted that, although 42 U.S.C. § 2000e-5(f)(3) extends federal jurisdiction to actions "brought under" Title VII, that cross-reference did not make the numerosity requirement jurisdictional. 546 U.S. at 514-515.

Second, while the mandatory nature of the "substantial showing" requirement underscores the importance of its enforcement, "rules, even if important and mandatory * * *, should not be given the jurisdictional brand" without more specific reference. *Henderson*, 131 S. Ct. at 1203; *see also Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010)

(mere use of word "shall" does not render statutory deadline jurisdictional).

Nor is jurisdictional status necessary to enforce the "substantial showing" requirement because the State can always challenge an insufficient "substantial showing" as part of the ensuing appeal, or it can attack the issuance of the certificate itself through panel rehearing of the single judge's decision under local circuit rules. *See, e.g.*, 5th Cir. R. 27.2; 6th Cir. R. 27(f); *see generally* Fed. R. App. P. 27(c); *cf. Dolan*, 130 S. Ct. at 2541 (deadline for imposing criminal restitution not jurisdictional because, *inter alia*, defendant had opportunity to contest belatedly ordered restitution amount). The Third, Seventh, Eighth and Ninth Circuits all recognize that a merits panel of the court of appeals may revisit the issuance of a certificate of appealability; only the Tenth Circuit has held to the contrary. *See Buie v. McAdory*, 322 F.3d 980, 981-982 (7th Cir. 2003) (collecting cases).

Third, unlike the notice of appeal held to be jurisdictional in *Bowles v. Russell*, 551 U.S. 205 (2007), there is no long history of treating procedural limitations on habeas petitions as jurisdictional. Quite the opposite, this Court has frequently "treated as nonjurisdictional other types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit" under AEDPA. *Reed*, 130 S. Ct. at 1246-1247; *see, e.g., Day v. McDonough*, 547 U.S. 198, 205 (2006) (one-year limitation period); *Trest v. Cain*, 522 U.S. 87, 89 (1997) (procedural default); *Granberry v. Greer*, 481 U.S. 129, 131 (1987) (exhaustion of state remedies).

Beyond that, what is critical to fulfill AEDPA's purposes is that the court of appeals actually find

that constitutional issues are present about which reasonable jurists could disagree. Whether the genesis of that determination is the petitioner's showing or the court's independent knowledge of a procedural problem that has developed in the law should not be jurisdictionally determinative.

B. The Court Had Jurisdiction To Adjudicate The Appeal Because Section 2253(c)(3)'s Requirement That The Court "Indicate" The Qualifying Issues For Appeal Is Not Jurisdictional

Section 2253(c)(3) provides that, when issuing a certificate of appealability, the court "shall indicate" which issues it determined to be eligible for appellate review. The question in this case is whether, when the court specifies a procedural issue qualifying for review but not a substantive constitutional claim, the court's omission is a jurisdictional barrier to the prisoner's opportunity for federal habeas review. It is not.[5]

To begin with, Section 2253(c)(3) does not require that courts recite or list the issues qualifying for appeal in any particular manner; the certificate need only "indicate" the appropriate issue. 28 U.S.C. § 2253(c)(3). To "indicate" is a less stringent

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[5] Three courts of appeals have held that, once a certificate of appealability issues, defects in its content do not deprive the appellate court of the jurisdictional power to act. *See* Pet. Cert. Reply Br. 12 (citing cases). While petitioner had included the Tenth Circuit in that list, further review now suggests that the Tenth Circuit is agnostic on the issue. *See United States v. Harms*, 371 F.3d 1208, 1210 (10th Cir. 2004).

statutory directive than to identify or specify, and commonly means to "point to or toward with more or less exactness." *Webster's Third New Int'l Dictionary* 1150 (1993); *see id.* (further defining "indicate" as "to point out"; to "give fair evidence of"; "to show the general outlines of in advance"); *Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993) ("'indicate[]' certainly imposes less of a burden than, say, 'requires' or 'necessitates'"). The phraseology thus lacks the precision and specificity that would normally be associated with jurisdiction-defining directives.

Where, as here, a certificate is issued on a public record that contains a substantial showing of a reasonably debatable constitutional claim, the existence of the certificate itself points toward that record as Section 2253(c)(3)'s indicator of a valid constitutional claim. Reading the record as a whole to support the court's issuance of a certificate, moreover, comports with the "presumption of legitimacy accorded to the Government's official conduct." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). Because *Slack* has been on the books for more than a decade now, the courts of appeals are fully familiar with the two-part determination required for issuance of a certificate of appealability in cases disposed of on procedural grounds.

Thus, under *Favish*, the logical assumption is that, when the court omitted reference to a constitutional claim in the certificate, the mistake was simply an oversight in processing, rather than

an effort to exercise appellate review forbidden by *Slack*.[6] And that oversight could be remediated by construing the certificate as necessarily indicating the constitutional issue for which the petitioner made a "substantial showing" in his application. Throwing the habeas petitioner's case out because of the error of the court is neither necessary nor appropriate.

Congress, in other words, would not have intended the insufficiency of a court's "indicat[ion]" of an issue to cut off the court's power to act on a properly presented habeas petition. Nothing in subsection (c)(3)'s text employs "jurisdictional terms" or speaks to the court's "adjudicatory capacity" or power to entertain a case. *Henderson*, 131 S. Ct. at 1202. Nor does the relevant text provide "any 'clear' indication that Congress wanted the rule to be 'jurisdictional,'" rather than an important case processing rule. *Id.* at 1203 (internal quotations omitted).[7]

Rather, the requirement to indicate issues operates like one of the "'many statutory requisitions

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[6] *See Beyer v. Litscher*, 306 F.3d 504, 506 (7th Cir. 2002) (noting that "the task of drafting the [certificate of appealability] order's language often is delegated to staff attorneys, who may lack appreciation of the pitfalls in collateral-review practice").

[7] To be sure, Congress's use of the mandatory word "shall" underscores the importance of the indication, but this Court "ha[s] rejected the notion that 'all mandatory prescriptions, however emphatic, are * * * properly typed jurisdictional.'" *Henderson*, 131 S. Ct. at 1205 (quoting *Union Pacific R. Co. v. Locomotive Engineers & Trainmen General Comm. of Adjustment*, 130 S. Ct. 584, 596 (2009)).

intended for the guide of officers in the conduct of business devolved upon them'" that "'do[es] not limit their power or render its exercise in disregard of the requisitions ineffectual.'" *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (quoting *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)); *accord United States v. Montalvo-Murillo*, 495 U.S. 711, 717-718 (1990); *see also Dolan*, 130 S. Ct. at 2539 (court retained jurisdiction to award victim restitution even after statutory deadline was missed).

More importantly, nothing in subsection (c)(3) "specif[ies] a consequence for noncompliance with" its dictate, let alone supports judicial imposition of a "coercive sanction" on the habeas petitioner who "bear[s] no responsibility" at all for the court's omission. *Dolan*, 130 S. Ct. at 2539, 2540. After all, petitioner, who was proceeding *pro se*, did everything that the law asked of him and, having made a substantial showing on both the procedural and constitutional issues, had absolutely no control over how the court wrote up its certificate of appealability. Protecting the Great Writ from the consequences of such judicial oversight would comport with the "equitable principles" that "have traditionally governed" habeas corpus, not to mention basic fairness. *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010).[8]

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[8] Underscoring subsection (c)(3)'s nonjurisdictional character, two courts of appeals have declined to treat the indicated issues as jurisdictionally constraining. *See, e.g., Rodriguez v. Scillia*, 193 F.3d 913, 920-921 (7th Cir. 1999) (considering claim made in petitioner's appellate brief that was not in

Finally, because Sections 2253(c)(2) and 2253(c)(3) are nonjurisdictional, respondent's failure to argue below that the content of the certificate of appealability was defective waived that argument. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (refusing to consider argument waived in lower court).

C. Regardless Of The Court Of Appeals' Jurisdiction, This Court Has Jurisdiction To Decide The Procedural Issue

By its plain text, AEDPA's certificate of appealability requirement does not apply to this Court. Section 2253(c)(1) refers to the certificate as a precondition only to "an appeal." 28 U.S.C. § 2253(c)(1). The inapplicability of the requirement to this Court's jurisdiction is why this Court was able to hold in *Hohn v. United States*, 524 U.S. 236 (1998), that a lack of appellate jurisdiction at the circuit level due to the court's refusal to issue a certificate of appealability did not cut off this Court's certiorari jurisdiction. *Id.* at 246-247. If this Court retains certiorari jurisdiction even when no certificate of appealability was issued, then it equally possesses jurisdiction to decide a case when a certificate of appealability was issued, albeit with a gap in its

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certificate); *Phelps*, 366 F.3d at 727-728 (court has power to expand scope of certificate to address additional issues). *But see Sixta v. Thaler*, 615 F.3d 569, 573 (5th Cir. 2010) ("We have jurisdiction to address only the issue specified in the COA.") (internal quotation marks omitted); *Hines v. Miller*, 318 F.3d 157, 162 (2d Cir. 2003) (similar).

content. In addition, this Court can issue a certificate of appealability itself, 28 U.S.C. § 2253(c), and thus could issue a corrected certificate for petitioner if that were deemed necessary to facilitate resolution of the important questions raised by his case.

Indeed, this Court has repeatedly exercised its power of review in cases where the lower courts' certificates of appealability contained the same defect as this case: identification of a procedural question for review, but omission of the underlying constitutional issue for which habeas relief was sought. In *Slack v. McDaniel*, for example, after the district court dismissed a habeas petition on procedural grounds, the court of appeals refused to issue a certificate of probable cause (the pre-AEDPA version of a certificate of appealability). 529 U.S. at 479-480. After ruling that AEDPA applied and that a certificate of appealability was therefore required, *id.* at 481-485, the Court did not simply stop because of the appeals court's jurisdictional defect. Instead, the Court went on to resolve the procedural question presented and reversed the district court. *Id.* at 485-489. The Court then remanded for the lower court to determine whether the petitioner was "otherwise entitled to the issuance of a COA" once the procedural obstacle had been removed. *Id.* at 485, 489-490.

Similarly, in *Jimenez v. Quarterman*, 555 U.S. 113 (2009), the district court dismissed the habeas petition as time-barred, and the court of appeals declined to issue a certificate of appealability, *id.* at 117-118. This Court reversed the district court's procedural dismissal, *id.*, and remanded for the lower

courts to decide "the merits of petitioner's federal constitutional claims." *Id.* at 118 n.3.[9]

This Court's consistent pattern of reviewing important procedural rulings by the lower courts even when the certificate of appealability fails to indicate the constitutional claim reflects a wise exercise of this Court's authority to promote uniformity in the law. AEDPA is an exceptionally complex statute, often navigated by individuals proceeding *pro se*. And it operates in an area of acute importance, where life and liberty interests intersect with the States' federalism-rooted interests in the finality of their criminal convictions. Particularly when, as here, a *pro se* prisoner with a substantial constitutional claim has done everything that the law requires of him to present his case for decision, this Court's intervention is critical to ensure that missteps by the *courts* do not slam the courthouse

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[9] *Compare Holland*, *supra* (deciding procedural question of equitable tolling under AEDPA), *with Holland v. Florida*, 539 F.3d 1334, 1338 (11th Cir. 2008) (certificate of appealability confined to procedural question); *compare Lawrence v. Florida*, 549 U.S. 327 (2007) (deciding statutory tolling question under AEDPA), *with Lawrence v. Florida*, 421 F.3d 1221, 1224 (11th Cir. 2005) (describing the purely procedural certificate of appealability issued); *compare Day v. McDonough*, 547 U.S. 198 (2006) (deciding timing question under AEDPA), *with Day v. Crosby*, 391 F.3d 1192, 1193 (11th Cir. 2004) (certificate of appealability confined to procedural question); *see also Peguero v. United States*, 526 U.S. 23 (1999) (deciding whether counsel's failure to inform defendant of right to appeal can be heard on collateral review, without a properly issued certificate of appealability, even after being informed of the defect, *see* U.S. Br. at 6 n.5, *Peguero*, *supra* (No. 97-9217)).

doors shut on petitioners' one and likely only opportunity for federal habeas review of constitutional claims. "Congress," after all, "expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal." *Slack*, 529 U.S. at 483. Accordingly, regardless of the court of appeals' jurisdiction, this Court should address the timeliness of petitioner's habeas petition and then remand for consideration of his constitutional claims.

II. PETITIONER'S SECTION 2254 PETITION WAS TIMELY FILED

As relevant here, AEDPA's one-year limitation period for the filing of habeas corpus petitions by state prisoners runs from "the latest of * * * the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The question in this case is when a judgment of conviction becomes "final" for defendants who do not seek discretionary review in the State's highest court.

The statute's plain text answers that question: the judgment becomes final at "the latest of" "the conclusion of direct review," which, under Texas law, was issuance of the intermediate appellate court's mandate, or at the expiration of time for seeking review. 28 U.S.C. § 2244(d)(1)(A). The court of appeals, however, discarded that straightforward reading of the statutory text and enforced in its place an inflexibly "uniform federal" rule that defines for all 50 States the end of direct review as the expiration of time for appeal, heedless of when their direct review processes actually conclude. Pet. App.

8a. That decision to throw out half of the relevant statutory text lacks any foundation in settled principles of statutory construction, this Court's precedent, AEDPA's purposes, or the statute's logical operation.

A. Direct Review Concluded When The Appellate Court's Mandate Issued

1. State Law Determines The "Conclusion of Direct Review"

There is no dispute that, as a matter of Texas law, the date on which the intermediate court of appeals issued its mandate was the date on which petitioner's judgment of conviction became final by the conclusion of direct review in the state court system. *See, e.g., Ex parte Johnson*, 12 S.W.3d at 472; *In re Long*, 984 S.W.2d 623, 626 (Tex. 1999) (per curiam). Nor has respondent ever disputed that, if the "conclusion of direct review" under Section 2244(d)(1)(A) means when the State's direct review actually concludes, petitioner's habeas petition was timely filed. *See* Pet. 6. At bottom, respondent's position and the court of appeals' decision depend critically on pretending that Section 2244(d)(1)(A) does not mean what it says. But that is not how statutory construction works.

a. The plain textual meaning incorporates state law

In applying AEDPA's limitation period, this Court "must presume that [the] legislature says in [AEDPA] what it means and means in [AEDPA] what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (construing 28 U.S.C. § 2255) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). Accordingly, when Congress said

that AEDPA's limitation period does not begin to run until "the conclusion of direct review," it must have meant the *actual* conclusion of direct review. And the actual conclusion of petitioner's direct review was the issuance of the intermediate appellate court's mandate on September 26, 2006.

There is no reason to depart from that straightforward meaning. The text is not ambiguous. "Direct review" has a settled meaning as the appellate process within the criminal case itself that directly reviews the judgment of conviction, *see Wall v. Kholi*, 131 S. Ct. 1278, 1283-1285 (2011), and "conclusion" means "the last part of anything," the "close, termination, end." *Webster's Third New International Dictionary* 471 (1993) (capitalization omitted). Because there was no review by this Court on direct appeal, *Jimenez*, 555 U.S. at 685, direct review concluded when "the last part" of state appellate consideration in the criminal case was "close[d], terminat[ed], [and] end[ed]" by issuance of the mandate. *Id.*

Nor is the phrase "conclusion of direct review" a term of art with any settled federal meaning that Congress would have employed to supplant state law. The phrase "conclusion of direct review" appears nowhere else in the U.S. Code, and is not a phraseology that this Court's prior cases had ever employed. Moreover, when Congress wanted to prescribe its own single, uniform definition for the conclusion of the state court's direct-review process in AEDPA, it said precisely what the procedural termination point was. *See* 28 U.S.C. § 2263(a) (time limitation in certain capital cases runs from "final State court *affirmance* of the conviction and sentence

on direct review") (emphasis added); *cf.* S. Ct. R. 13.3 ("The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance of the mandate (or its equivalent under local practice.")). Thus, when Congress wants to specify a particular moment for direct review to conclude, "it knows how to say [so]." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 329 n.22 (1981). Employing undefined language like "conclusion of direct review" that has variable meaning in different state procedural contexts is not such a statement.

Instead, Congress employed language that had no established federal meaning and that, by its content, straightforwardly references state-law processes. Congress did so, moreover, within a statutory provision the sole function of which is to attach legal consequences to state law's operation. And it did that within a statute, AEDPA, that is specifically designed to promote respect for those State laws and processes. Thus the logical conclusion is that Congress meant for its state-law-referencing language to incorporate those state-law rules in determining when the federally prescribed finality test is met.

To be sure, Section 2244(d)(1) provides a "uniform federal" definition of when a judgment of conviction becomes "final." *Clay v. United States*, 537 U.S. 522, 530-531 (2003). As relevant here, that federal definition is the later of two selected dates: "[i] the conclusion of direct review or [ii] the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). But what is critical is that Congress did *not* dictate a uniform federal answer for

when either prong of its two-part finality test is met. Rather, those prongs draw their core meaning from state law, and turn only to federal law if and when this Court's certiorari review comes into the picture. *See Jimenez*, 555 U.S. at 685-686. That is because, "[o]rdinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions." *Carey v. Saffold*, 536 U.S. 214, 223 (2002) (construing AEDPA); *see Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946) (determining whether a state judgment is final may require "resort to the local law to determine what effect the judgment has under the state rules of practice").

AEDPA's structure and purpose confirm the appropriateness of that reference to state law. After all, the whole purpose of the inquiry is to determine when the conclusion of the States' own direct review processes occurs. Indeed, looking to state law to determine how federal tests and standards are met is commonplace under AEDPA. Under Section 2244(d)(1)(A) itself, state law both defines what "direct review" is and the state courts—and state procedures—that it includes. In *Jimenez*, for example, this Court held that the distinct state process for reopening direct appeals determined when direct review concluded. 555 U.S. at 686.

State law, moreover, determines when state postconviction review ends under subsection (d)(1)(A)'s neighboring tolling provision. 28 U.S.C. § 2244(d)(2). *See Lawrence*, 549 U.S. at 331-333 (state-law rule, which was issuance of the mandate, determines when state postconviction review concludes). That is particularly significant because

this Court has recognized that the tolling provision "work[s] together" with Section 2244(d)(1)(A) to promote exhaustion, *id.* at 332-333, and thus the two provisions' deference to state-law rules and processes should be consistent.

State law also determines whether an application for state postconviction review was "properly filed" for purposes of Section 2244(d)(2)'s tolling provision. *See Pace v. DiGuglielmo*, 544 U.S. 408 (2005); *Artuz v. Bennett*, 542 U.S. 4, 8 (2000). In addition, state law generally governs whether an appeal remains "pending" after a lower court decision on collateral relief but before the filing of an appeal or request for discretionary review. *Carey*, 536 U.S. at 220-225 (collateral relief remains "pending" when the appeal is timely under state rules).

State law even works its way into the Fifth Circuit's purportedly "uniform federal" approach by defining when the time for appealing to the State's highest court expires. Pet. App. 4a, 8a. But there is no textual or logical basis for such a heads-the-State-wins-tails-the-habeas-petitioner-loses view of state law's role under Section 2244(d)(1)(A). To the contrary, it would be passing strange to hold that, when federal law measures its operation by reference to long-established state processes, the law was meant to ignore how those processes actually work.

b. Precedent has employed the state-law rule

Precedent reinforces the text's respect for state-law processes. Most directly, in *Jimenez v. Quarterman*, *supra*, this Court recognized that determining Section 2244(d)(1)(A)'s "uniform date of finality" required resort to state-law rules to

determine when the "conclusion of direct review" occurs. 555 U.S. at 686. The Court held that, when a state court "in fact reopened direct review" approximately seven years after it had originally concluded, that state-law procedure "rendered" the conviction "nonfinal for purposes of § 2244(d)(1)(A) during the pendency of the reopened appeal." *Id.* at 686 n.4.

In so holding, this Court specifically rejected the argument that Section 2244(d)(1)(A) "'pinpoints' a uniform federal date of finality that does not 'vary from State to State,'" holding instead that AEDPA requires federal courts "to make use of the date on which the entirety of the state direct appellate review process was completed" in actuality under state law. 555 U.S. at 686.[10]

Respondent's and the court of appeals' insistence on a woodenly "linear limitations period" that prescribes a homogenized federal "date of finality" is just as wrong here as it was in *Jimenez*, 555 U.S. at 684, 686. Section 2244(d)(1)(A) prescribes no uniform "date" when finality occurs, but instead prescribes a uniform, two-prong test for measuring when judgments become "final." Congress, however, did not prescribe a uniform answer under each prong. Instead, Congress left it to state law to determine when a State's own direct review process concluded

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[10] *See also Wall*, 131 S. Ct. at 1286 n.3 (noting that a sentence-reduction proceeding under state law could be defined by state law to constitute part of the "direct review" process, rather than collateral review, for purposes of Section 2244(d)).

and when its own time periods for seeking review within the state court system expired.[11]

Respondent's and the court of appeals' approach fails for yet another and even more basic reason. It throws out half of the statutory text whenever review is not sought by a defendant in the State's highest court. Under their view, the expiration of time for seeking review in that higher state court becomes the sole criterion for determining finality in such cases. Pet. App. 4a; *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003); Cert. Opp. 19-20. The "conclusion of direct review" prong simply drops out of the picture.

But that is not how this Court reads statutes. This Court "'must give effect to every word of a statute wherever possible.'" *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)). And that rule applies with particular force when, as here, the two clauses are disjunctive, joined by "or", and Congress has commanded that "the latest of" the two controls. *See Clay*, 537 U.S. at 529 (noting that the "or" in Section 2244(d)(1)(A) is "disjunctive"). That disjunctive mandate to select the latest of two points in time demands that the statute not be read to "rob" the direct-review prong of its "'independent and

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[11] States employ a wide variety of deadlines for pursuing relief in their highest courts. The shortest deadline is Georgia's, which is 10 days after the court of appeals' opinion, Ga. Ct. App. R. 8.500, and the longest is Tennessee's 60-day period. Tenn. R. App. P. 11. Most States use a 30-day deadline. *See, e.g.*, Neb. Rev. Stat. § 24-1107; Ind. R. App. P. 57(C)(1). *See generally Carey*, 536 U.S. at 219, 222 (noting the differing time periods for state appeals).

ordinary significance.'" *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1403 (2010) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1979)).

Nor is the court of appeals' approach consistent with reality. Even if a defendant does not file for discretionary review in the State's highest court, his direct review process does not suddenly evaporate. It still exists and has its own, definitive conclusion. And Congress gave significant and independent legal effect to the point in time when that direct review concludes in Section 2244(d)(1)(A).

Accordingly, AEDPA's plain text commands that courts determine both when direct review concludes and when the time for seeking further review expires, and enforce the later time as the date on which the judgment became final. To be sure, the expiration of the time for seeking review will frequently be the later date. But, given that more than half of the States define the conclusion of direct review as the issuance of the mandate or similar process, *see* Pet. 26-27 n.7; Va. S. Ct. R. 5A:31, there will also be many times when (as here) the conclusion of direct review postdates the time for filing an appeal to the State's highest court. When that happens, respondent cannot simply wish the later finality date away when Congress clearly said to count it.

c. ***Deference to state law comports with AEDPA's purpose***

Employing state law to inform when Section 22244(d)(1)(A)'s two-prong test is met accords with AEDPA's purposes and intended operation.

First, Congress devised Section 2244(d)(1)(A)'s two-part finality test to parallel the well-established

test for finality under this Court's postconviction retroactivity jurisprudence, as laid out in *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). *See, e.g.*, *Jimenez*, 555 U.S. at 685; *Clay*, 537 U.S. at 527-529. It is thus significant that two courts of appeals have held that, when direct review was not sought in a State's highest court, *Caspari*'s rule for finality looks to state law to determine when the direct review process ends. *See Losh v. Fabian*, 592 F.3d 820, 824 (8th Cir. 2010) (applying state-law time period for seeking review in state supreme court, and concluding that "Minnesota's highest court is plainly competent to determine that a type of appellate review under its law is not direct" review); *id.* at 825 (noting that *Jimenez* made state law determinative of whether a reinstated appeal constituted direct review); *Wheeler v. Jones*, 226 F.3d 656, 659 (6th Cir. 2000) (relying on state law to determine that "long-delayed appeals are not regarded as part of a defendant's direct appeal" for purposes of *Teague v. Lane*, 489 U.S. 288 (1989), and *Caspari*).

Second, the disregard for state law that the court of appeals prescribed makes no sense under a statute so heavily animated by federalism principles and respect for the integrity of state processes. *See Duncan v. Walker*, 533 U.S. 167, 178 (2001) (AEDPA was designed to promote principles of "comity, finality, and federalism"). By giving effect to state-law rules governing the conclusion of direct review, AEDPA enforces respect for the autonomy and dignity of state criminal processes and fosters comity by abstaining from interposing federal jurisdiction until the State courts have, from their own perspective, finished their work and disengaged from the case. *Cf. Duncan*, 533 U.S. at 178-179 (AEDPA's

exhaustion requirement "ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment."). Patience for the State's ability under state law to rehear or reconsider a decision, even *sua sponte*, costs relatively little in terms of time (generally measured in weeks, not years), and demonstrates respect for the state courts' role in the enforcement of federal law. *See id.* at 179.

A wooden federal rule, on the other hand, wrests control of the case from a state court of appeals before that court has said it is done, and creates the "unseemly" possibility that state and federal courts could be disagreeing over when the state court ended its own review process. *Duncan*, 533 U.S. at 179.

Third, while AEDPA seeks to promote finality, Congress carefully balanced that interest with the equally imperative goal of ensuring that diligent litigants would be afforded one full and fair opportunity to obtain federal habeas review of their constitutional claims. Indeed, in *Rhines v. Weber*, 544 U.S. 269 (2005), this Court recognized that a "petitioner's interest in obtaining federal review of his claims [can] outweigh[] the competing interests in finality and speedy resolution of federal petitions," *id.* at 278. Thus, in crafting AEDPA's provisions, Congress never "los[t] sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights," and strove to implement its reforms "without undermining basic habeas corpus principles." *Holland*, 130 S. Ct. at 2562 (internal quotation marks omitted).

Importantly, respecting state-law rules for the conclusion of direct review guarantees prisoners the full benefit of the one-year filing period set out in Section 2244(d)(1) by ensuring that the limitation period does not begin running before state law would permit a state habeas filing. Under its externally imposed definition of finality, however, the court of appeals started the one-year clock running on petitioner's federal habeas deadline *before* state law rendered his judgment of conviction final and *before* state law permitted him to file for state postconviction relief to toll the limitation period, 28 U.S.C. § 2244(d)(2). And Texas is not the only State whose law would leave prisoners in such a procedural bind. More than half of the States define when direct review ends by issuance of a mandate or some marker other than expiration of the time for appeal. *See* Pet. 13 n.2, 26-27 n.7. And at least 16 States forbid prisoners to file for state postconviction relief until after direct review concludes under state law.[12]

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[12] *See Ex parte Hargett*, 772 So. 2d 481, 482 (Ala. Crim. App. 1999) (if filed before conviction is final, habeas petition will be held in abeyance); Ariz. Rev. Stat. Ann. 13-4232(a)(1) ("A defendant is precluded from relief under this article based on any ground: (1) still raiseable on direct appeal or on a post-trial motion."); Del. Super. Ct. R. Crim. P. 61(b)(4) ("A motion may not be filed until the judgment of conviction is final."); *Jones v. State*, 602 So. 2d 606, 607-608 (Fla. Dist. Ct. App. 1992) ("[A] judgment and sentence become final for purposes of filing a motion for post-conviction relief when appellate proceedings have concluded, *i.e.*, upon issuance of the mandate."); *Brigham v. State*, 950 So. 2d 1274, 1275 (Fla. Dist. Ct. App. 2007) ("Implicit in the rule [governing postconviction relief] is the requirement that the judgment and sentence be final before the motion is filed."); *Horton v. Wilkes*, 302 S.E.2d

The court of appeals' uniform federal date thus would take a significant bite out of the one-year limitation period for a large number of state prisoners. There is no evidence that Congress intended such lopsided protection for the Great Writ, or to use Section 2244(d)(1)(A) in a way that would

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94, 95 (Ga. 1983) ("[A] person imprisoned * * * cannot institute a petition for habeas corpus until the conviction is final."); Haw. R. Pen. P. 40 (requiring that petition be brought after final judgment); *Crowell v. Commonwealth*, 225 N.E.2d 330, 330 (Mass. 1967) ("Habeas corpus cannot be employed as a substitute for ordinary appellate procedure, and so, in general, is not available where there is a remedy by writ of error or appeal."); Minn. Stat. § 590.01, subdiv. 1 ("Except at a time when direct appellate relief is available, a person convicted of a crime * * * may commence a proceeding * * *."); Nev. Rev. Stat. § 34.726(1) ("Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur."); *Sleeper v. Warden, N.H. State Prison*, 920 A.2d 1200, 1202 (N.H. 2007) ("When court action results in the loss of a constitutionally protected liberty interest, it may be collaterally attacked by way of petition for writ of habeas corpus after the time for direct appeal has expired.") (internal quotations omitted); N.J. Ct. R. 3:22-3 ("[A petition for postconviction review] is not * * * a substitute for appeal from conviction or for motion incident to the proceedings in the trial court, and may not be filed while such appellate review is pending."); Pa. Consol. Stat. § 9545 (collateral review is available when the conviction or appeal becomes final); *Commonwealth v. Johnson*, 841 A.2d 136, 139 (Pa. Super. Ct. 2003); Tex. R. Crim. P. Art. 11.07 § 3; Utah Code § 78B-9-106 (collateral review is not available for claims that "may still be addressed at trial or on appeal"); W. Va. Stat. § 53-4A-1 (same); Wis. Stat. § 974.06 (same).

"'trap the unwary *pro se* prisoner.'" *Slack*, 529 U.S. at 487; *see Carey*, 536 U.S. at 220 (rejecting interpretation of tolling provision that would "encourag[e] state prisoners to file federal habeas petitions *before* the State completes a full round of collateral review").

By contrast, if an intermediate appellate decision becomes final at a single, common point for both state postconviction and AEDPA timing purposes, the one-year limitation period for federal habeas will be preserved evenhandedly for all state prisoners. In addition, utilizing state law facilitates a seamless transition between the governing state and federal rules that petitioners commonly must navigate *pro se*, while protecting petitioners' reasonable reliance on state law to determine when their state review process ends. Lastly, a state-sensitive rule fosters consistency between AEDPA's tolling and accrual provisions. *See, e.g.*, *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998) (avoiding interpretation of "second or successive" petition rules that would allow "dismissal * * * for technical procedural reasons * * * [to] bar the prisoner from ever obtaining federal habeas review").[13]

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[13] The Fifth Circuit in *Roberts* suggested that exclusive reference to the "expiration of time" prong had the benefit of ensuring notice to the defendant because, in Texas, "[t]he state appeals court notifies the defendant when its judgment is entered, but it sends the mandate to the trial court, not the defendant." *Roberts*, 319 F.3d at 694 n.23. That is simply incorrect as a matter of Texas procedure. Under Texas Rule of Appellate Procedure 18.1, copies of the mandate are sent to all parties to the appeal. Thus, using some fixed period after the

Fourth, enforcement of state rules also reduces "the potential for delay on the road to finality," *Rhines*, 544 U.S. at 276 (quoting *Duncan*, 533 U.S. at 179), and encourages state prisoners to "file their federal habeas petitions as soon as possible," *Duncan*, 533 U.S. at 181. Just as a blunt, inflexible rule would cause many petitioners' judgments of conviction to be declared final *too early*, the rule would also cause other prisoners' finality date to come *too late* if State law concludes direct review before the superimposed federal rule would.[14] Deference to State law rules governing the conclusion of direct review, by contrast, ensures that finality occurs at exactly the right time—no later or earlier than state postconviction review becomes available.

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decision date provides no more notice to the defendant than using the mandate and, in fact, would simply contribute to confusion for all parties as they try to sort out and administer contradictory state and federal timelines for conclusion of the same state direct review process in the same case.

[14] *See, e.g., Sanders v. State*, 791 N.W.2d 126, 129 (Minn. 2010) (noting that judgment was final upon entry of appellate court judgment because petitioner's "time to file his petition for postconviction relief" would have lapsed two years from that date had he not qualified for a safe harbor) (citing Minn. Stat. § 590.01 (2008)); *Hickey v. Riera*, 774 N.E. 2d 1, 10 (Ill. App. Ct. 2001) ("Where there has been an appeal from a circuit court judgment, the judgment of the appellate court becomes final when entered."); *Gillis v. F & A Enterprises*, 934 P.2d 1253, 1255-1256 (Wyo. 1997) (judgment of appellate court is final so as to start the time limit for state habeas filings when "the written opinion is filed with the clerk").

2. *If a Uniform Federal Rule Governs When Direct Review Concludes, It Should Be the Mandate*

If Section 2244(d)(1)(A) were to impose not just a uniform federal definition of finality, but also a "uniform federal rule" for when direct review concludes in each State, then the measure most consistent with precedent and AEDPA's purposes would be the appellate court's issuance of its mandate.

First, issuance of the mandate (or its variously named equivalent) is the most common state-law denominator of when direct review ends, as it is employed by more than half (27) of the States. *See* Pet. 13 n.2; *Beckner v. Friendly Ice Cream Corp.*, No. 219047, 2004 WL 1662290, at *3 n.35 (Va. Cir. Ct. 2004) (unpublished) (explaining that, because decision of Virginia Supreme Court "will not be final until that Court issues its mandate, this case, having neither been stayed nor yet mooted, remains on this Court's docket and thus ripe for decision"); Va. S. Ct. R. 5A:31 (providing that the mandate shall mark finality for both Supreme Court and Court of Appeals proceedings).

Second, the mandate is also a sensible test for identifying the conclusion of the appellate direct review process. Traditionally, issuance of the mandate is the judicial act that formally concludes a case, deprives the appellate court of jurisdiction to alter its order, and constitutes the appellate court's binding directive for disposition of the case to the lower court. *See* 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3987 n.1 (4th ed. 2011) ("[T]he effect of the mandate is to bring the

proceedings in a case on appeal to a close and to remove it from the jurisdiction of the appellate court.") (quoting *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978)).[15] The mandate both functionally and "formally marks the end of appellate jurisdiction," *Johnson v. Bechtel Assoc. Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986), and thus the clear "conclusion" of the appellate process.

Third, this Court's AEDPA precedent has repeatedly referred to the mandate as the point when state direct review concluded, underscoring its widespread recognition as the traditional marker of appellate closure. In both *Lawrence*, *supra*, and *Holland*, *supra*, this Court referred to the state courts' issuance of their mandates as the point when the state postconviction proceedings were no longer "pending" for purposes of tolling the limitation period, 28 U.S.C. § 2244(d)(2). Indeed, in language that applies with equal logic to the termination point for state direct review, this Court explained in *Lawrence* that, after the state court "has issued its mandate * * * no other state avenues for relief remain open" and the previously pending "application for state post conviction review no longer exists." 549 U.S. at 332; *see id.* at 330-331 (thrice identifying the mandate's issuance as the trigger that commenced running of the Section 2244(d)(1) federal habeas

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[15] *See also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (mandate marks when "lengthy federal proceedings have run their course"); *Deering Milliken, Inc. v. Federal Trade Comm'n*, 647 F.2d 1124, 1129 (D.C. Cir. 1978) ("[A]s long as the appellate court retains its mandate it maintains its jurisdiction over the case.").

limitation period); *see also Holland*, 130 S. Ct. at 2556 ("[T]he court issued its mandate, making its decision final."); *id.* at 2559; *Clay*, 537 U.S. at 529 (noting that the mandate might well be the appropriate reference point for "the conclusion of direct review," standing alone).

Fourth, at the time AEDPA was enacted, the mandate would have been a logical reference point for Congress because "several lower courts ha[d] held that finality attends issuance of the appellate court's mandate" under the then-governing text of Federal Rule of Criminal Procedure 33's new-trial provision. *Clay*, 537 U.S. at 527; *see* Fed. R. Crim. P. 33 (1996).[16] A Senate Report, moreover, referenced Rule 33 when discussing AEDPA's time limitation provisions. *See* S. Rep. No. 220, 98th Cong., 1st Sess. 9-10 (Sept. 14, 1983).

In addition, under the Speedy Trial Act, 18 U.S.C. §§ 1361 *et seq.*, the circuit courts are unanimous in interpreting finality, for purposes of the conclusion of appellate court proceedings, as occurring upon the court's issuance of its mandate. *See* Pet. 29 (listing cases); *Clay*, 537 U.S. at 527 (noting that mandate determines finality for purposes of Speedy Trial Act when an appeals court orders a new trial).

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[16] *See United States v. Reyes*, 49 F.3d 63, 66-68 (2d Cir. 1995); *United States v. Spector*, 888 F.2d 583, 584 (8th Cir. 1989); *United States v. Cook*, 705 F.2d 350, 351 (9th Cir. 1983); *United States v. Gross*, 614 F.2d 365,366 n.2 (3d Cir. 1980); *United States v. Granza*, 427 F.2d 184, 185 n.3 (5th Cir. 1970); *Casias v. United States*, 337 F.2d 354, 356 (10th Cir. 1964).

Finally, if state law does not control as argued above, *see* Section II.A.1, *supra*, then marking finality by issuance of the appellate court's mandate is the next best means of preserving the balance of interests that Congress struck in crafting AEDPA. State law would rarely, if ever, conclude its direct review process at a point *after* issuance of the mandate because the mandate marks the appellate court's surrender of the case to the lower court. That is particularly true for intermediate appellate courts, because there appears to be no State that issues its mandate before the time for seeking review in a higher state court has expired. Accordingly, measuring finality by the mandate would ensure that all state habeas petitioners receive the full one-year limitation period that Congress provided in AEDPA and thus that the Great Writ can continue to "play[] [its] vital role in protecting constitutional rights." *Holland*, 130 S. Ct. at 2562.

To be sure, shorter markers could be devised to truncate direct review, but none of them would have the widespread acceptance of the mandate, and all of them would risk leaving habeas petitioners trapped between the commencement of the federal limitation period due to finality, on the one hand, and a state-law ban on prematurely seeking postconviction relief to stop the running of that time, on the other hand.[17]

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[17] The availability of equitable tolling under AEDPA is no answer because equitable tolling cannot be applied to unravel a deliberate timing determination by Congress embodied in statutory text. *See Holland*, 130 S. Ct. at 2563.

B. The Petition Was Timely Because The "Expiration Of Time For Seeking Review" Prong Includes The 90-Day Period For Filing A Petition For Writ Of Certiorari

1. This Court Has Repeatedly Held That Section 2244(d)(1)(A) Includes The 90-Day Certiorari Timeframe

The petition was not only timely under the "conclusion of direct review" prong, but also under the "expiration of time for seeking * * * review" prong of Section 2244(d)(1)(A). "[T]his Court's consistent understanding of finality in the context of collateral review" is that "a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." *Clay*, 537 U.S. at 524-525. The Court has repeatedly ruled that Section 2244(d)(1)(A) embodies that "unvarying understanding of finality." *Id.* at 527-528; *see Jimenez*, 555 U.S. at 685. Adoption of that "uniform federal rule" of finality ensured—as state law otherwise might not have—that judgments of conviction do not become final until *both* the direct review *and* the time for appeal prongs have each ended, including in particular the time for seeking certiorari review by this Court. *Clay*, 537 U.S. at 531; *see id.* at 532 (holding, by analogy to Section 2244(d)(1)(A)'s inclusion of certiorari time, that the limitation period for federal prisoners under 28 U.S.C. § 2255 does not commence until the time for seeking certiorari has expired).

The text of Section 2244(d)(1)(A) thus built upon the "long-recognized, clear meaning" of "finality" employed by this Court for "post-conviction relief,"

which "attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay*, 537 U.S. at 527 (citing *Caspari*, 510 U.S. at 390); *see also Caspari*, 510 U.S. at 390 ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.").

Confirming the point, this Court ruled unanimously in *Jimenez*, *supra*, that a judgment of conviction does not become final under Section 2244(d)(1)(A) "until the 'availability of direct appeal to the state courts,' * * * and to this Court * * * has been exhausted." 555 U.S. at 685 (internal citations omitted). Accordingly, if a "prisoner chooses not to seek direct review in this Court, then the conviction becomes final when the time for filing a certiorari petition expires." *Id.* (internal quotation marks omitted).

That certiorari-time rule accords with this Court's longstanding precedent holding that direct review of a state court decision necessarily includes the right to seek review by this Court. *See Griffith v. Kentucky*, 479 U.S. 314, 321 (1987) ("direct review" included Griffith's petition for a writ of certiorari); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("[T]he process of direct review * * *, if a federal question is involved, includes the right to petition this Court for a writ of certiorari."); *Bell v. Maryland*, 378 U.S. 226, 232 (1964) (review by the United States Supreme

Court is included in the "direct review" of a state decision).

Notwithstanding the explicitness of this Court's repeated holdings that Section 2244(d)(1)(A) includes the 90-day period for filing a petition for certiorari and notwithstanding the court of appeals' preference for a "uniform federal rule" (Pet. App. 8a), the court excluded those 90 days in determining when AEDPA's one-year limitation period began to run for petitioner. *See* Pet. App. 4a. In applying Section 2244(d)(1)(A)'s "expiration of the time for seeking such review" prong, the court of appeals included only expiration of the 30-day period for seeking review in the Texas Court of Criminal Appeals. *Id.*; *see Roberts*, 319 F.3d at 693-695 & n.14. Had that 90 days been included, as *Jimenez*'s and *Clay*'s "uniform federal rule" indicates, *Clay*, 537 U.S. at 531, petitioner's federal habeas petition would have been timely filed. *See* Pet. 6.

2. The Jimenez/Clay *90-Day Rule Applies Regardless Of Whether Discretionary Review Is Sought In The State's Highest Court*

The Fifth Circuit categorically ruled that the 90-day certiorari period that this Court has repeatedly included under Section 2244(d)(1)(A) does not apply when a prisoner's attorney fails to apply for discretionary review in the State's highest court on direct review. *Roberts*, 319 F.3d at 693 n.14. That was mistaken.

To be sure, as a general rule, under 28 U.S.C. § 1257(a), certiorari review must be sought from a "state court of last resort," not intermediate appellate courts. But this Court has recognized exceptions to

that rule under which identification of the relevant state high court may not be discernible from the face of a certiorari petition. *See Brown v. Texas*, 443 U.S. 47, 50 (1979) (state-law limits); *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 237 & n.1 (1967) (next highest state court "apparently" lacked jurisdiction); *Metlakatla Indian Cmty. Annette Island Reserve v. Egan*, 363 U.S. 555, 559-560 (1960) (higher court not functioning). In addition, this Court retains the authority to review intermediate court decisions under the All Writs Act, 28 U.S.C. § 1651(a). *See Hohn*, 524 U.S. at 250-251.

There accordingly is no inflexible bar to certiorari petitions from intermediate state courts receiving this Court's review. And deciding which certiorari petitions to include and exclude under the Fifth Circuit's rule would require a case-by-case inquiry into the substantive merits and viability of filed and never-filed certiorari petitions to determine which ones *deservedly* affected the finality of the conviction. That rule would entail such a substantial devotion of court and governmental resources to administer that Congress may well not have considered it worth the candle, preferring instead uniform inclusion of the certiorari period at the end of the direct review process.

Indeed, nothing in Section 2244(d)(1)(A)'s text, precedent, or practice has hinged the availability of the 90-day certiorari period on the meritorious content of the certiorari petition or even its jurisdictional viability. Quite the contrary, there is nothing less viable than a non-existent, never-filed certiorari petition. But Section 2244(d)(1)(A) includes the 90-day certiorari timeframe without

regard to the merits of the prisoner's case or even an announced intent not to seek certiorari. *See, e.g.*, *Snook v. Wood*, 89 F.3d 605, 608 (9th Cir. 1996) (petitioner asked that his direct appeal be dismissed upon remand to the intermediate appellate court, evincing his intent not to seek certiorari). Cases in which only *Anders* briefs were filed (*see Anders v. California*, 386 U.S. 738 (1967)), or in which only jurisdictionally deficient claims are presented—such as state-law claims, claims resting on adequate and independent state-law grounds, or "wholly insubstantial and frivolous" federal claims—get the same 90-day certiorari time as those presenting trailblazing constitutional questions for this Court's review.[18]

What is critical for finality purposes is that nothing in the language of Section 2244(d)(1)(A) makes "expiration of the time for seeking [direct] review" conditional upon *any* action by the habeas petitioner, let alone upon the merits of his certiorari petition. Instead, the language of Section 2244(d)(1)(A) provides a petitioner the benefit of the period remaining for seeking direct review with the explicit understanding that the petitioner need do nothing at all to trigger it. That is because Section 2244(d)(1)(A) "is concerned solely with the question of time, not whether a defendant's appeal qualifies on the merits for review by the Supreme Court." *Nix v.*

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[18] *See Arbaugh*, 546 U.S. at 513 n.10 (federal question jurisdiction is lacking over "wholly insubstantial and frivolous" claims) (quoting *Bell v. Hood*, 327 U.S. 678, 682-683 (1946)); *see* Oral Arg. Tr. 50-51, *Jimenez, supra* (Nov. 4, 2008) (*Anders* briefs filed in both appeals on merits of constitutional claims).

Secretary for the Dep't of Corrs., 393 F.3d 1235, 1237 (11th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005).

Furthermore, for purposes of retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989), at least two courts have included the 90-day certiorari timeframe under *Caspari*, 510 U.S. at 390, even when the habeas petitioner stopped the appellate process before discretionary review in a State's highest court. *See Snook*, 89 F.3d at 608 (direct appeal voluntarily withdrawn in court of appeals); *Barron v. Howes*, No. 1:07-CV-620, 2008 WL 3539788, at *3 (W.D. Mich. Aug. 12, 2008). That is important because this Court has held that Section 2244(d)(1)(A) parallels this Court's *Caspari* definition of finality for *Teague* purposes in postconviction relief proceedings. *See Clay*, 537 U.S. at 527.

Finally, opening the door to merits-based scrutiny of the viability of appeals or certiorari petitions would destroy the clarity and easy administrability of AEDPA's otherwise uniform inclusion of the 90-day certiorari window. Indeed, courts presumably would also have to start policing whether appeals taken within the state court system were permissible on the merits or jurisdictionally, as well. States, for example, may limit appellate review by those who enter guilty pleas. *See* Md. Code Ann. § 12-204(4) (no review by State's highest court allowed without permission); Ca. R. Ct. 8.304 (prohibiting appeals from guilty pleas absent a certificate of probable cause). Administering the Fifth Circuit's rule would require courts, often years after the fact, to dissect the procedural, legal, and factual viability of appeals and certiorari petitions actually filed or hypothetically fileable on direct

ADDENDUM

TABLE OF CONTENTS

U.S. CONST. Amend. VI 1a

U.S. CONST. Amend. XIV, § 1 ..... 2a

28 U.S.C. § 2253(a) & (c) 3a

28 U.S.C. § 2254 ..... 4a

Fed. R. App. P. 22 ..... 8a

Rule 11 of the Rules Governing Habeas Corpus Cases Under Section 2254 ..... 10a

review. The simplicity, clarity, and ready administrability of Section 2244(d)(1)(A)'s automatic inclusion of the certiorari period, under *Clay* and *Jimenez*, by contrast, affords both habeas petitioners and States plain notice while promoting the resource-efficient calculation of AEDPA time limits.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

* * * * *

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances

what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

FEDERAL RULES OF APPELLATE PROCEDURE

VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

Rule 22. Habeas corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the

district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C.A. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 10-895

In the Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ, PETITIONER

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal?

2. Was the application for a writ of habeas corpus out of time under 28 U.S.C. § 2244(d)(1) due to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"?

TABLE OF CONTENTS

Page

Questions Presented I

Statement 1

Summary of Argument 4

Argument 7

I. The Fifth Circuit lacked jurisdiction to adjudicate Gonzalez's appeal 7

A. The Fifth Circuit lacked jurisdiction over Gonzalez's appeal because the circuit judge failed to issue a "certificate of appealability" within the meaning of section 2253(c) 9

1. The text and structure of the statute show that a document that fails to "indicate" a constitutional claim cannot qualify as a "certificate of appealability" under section 2253(c) ... 10

2. The required contents of a COA are no less "jurisdictional" than the required contents of a notice of appeal 20

3. A document that fails to "indicate" a constitutional claim cannot serve the evidentiary function of a COA 24

B. The circuit judge erred by purporting to issue a COA, but he did not exceed his jurisdiction 26

1. Under *Slack* and *Miller-El*, a COA should not issue where a "substantial" constitutional claim is clearly barred on procedural grounds.. 28

2. Gonzalez cannot obtain a COA on his speedy-trial claim because his failure to exhaust that claim is not debatable among jurists of reason 31

3. A circuit justice or judge would commit legal error by issuing a COA on Gonzalez's speedy-trial claim, but would not exceed jurisdictional limits 34

C. Based on the answer to the first question presented, this Court should vacate the Fifth Circuit's judgment and remand with instructions to dismiss for lack of jurisdiction, without reaching the second question presented 35

1. This Court should not decide the statute-of-limitations issue because the Fifth Circuit lacked jurisdiction over Gonzalez's appeal 35

2. This Court cannot cure the jurisdictional defect in Gonzalez's case by issuing a new COA 37

II. Gonzalez's habeas application is time-barred under 28 U.S.C. 2244(d) 39

A. The text and structure of section 2244(d)(1) support the Fifth Circuit's construction of section 2244(d)(1)(A) 41

B. Gonzalez's construction of section 2244(d)(1)(A) is irreconcilable with this Court's decisions in *Clay* v. *United States* and *Jimenez* v. *Quarterman* 45

C. The Fifth Circuit's construction of section 2244(d)(1)(A) simplifies the task for courts that must determine "the conclusion of direct review" 51

D. Gonzalez does not enjoy the benefit of the 90-day period for filing a certiorari petition 56

Conclusion 58

TABLE OF AUTHORITIES

Cases:

Anjulo-Lopez v. *United States*, 541 F.3d 814 (8th Cir. 2008) 57

Baldwin v. *Reese*, 541 U.S. 27 (2004) 31

Banks v. *California*, 395 U.S. 708 (1969) 56

Barefoot v. *Estelle*, 463 U.S. 880 (1983) 26, 29, 30, 31

Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) 35

Brown v. *Allen*, 344 U.S. 443 (1953) 27

Clay v. *United States*, 537 U.S. 522 (2003) ..... *passim*

Clay v. *United States*, 30 F. App'x 607 (7th Cir. 2002) 46

Columbus Watch Co. v. *Robbins*, 148 U.S. 266 (1893) 23

Costarelli v. *Massachusetts*, 421 U.S. 193 (1975) 56

Dolan v. *United States*, 130 S. Ct. 2533 (2010) 19

Dupuy v. *Butler*, 837 F.2d 699 (5th Cir. 1988) 34

Edwards Aquifer Auth. v. *Chem. Lime, Ltd.*, 291 S.W.3d 392 (Tex. 2009) 54

Gonzalez v. *Thaler*, 131 S. Ct. 2989 (2011) 8, 35

Griggs v. *Provident Consumer Disc. Co.*, 459 U.S. 56 (1982) 20

Groh v. *Ramirez*, 540 U.S. 551 (2004) 5, 24, 25, 26

Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011) 34

Hohn v. *United States*, 524 U.S. 236 (1998) 38
Jimenez v. *Quarterman*,
129 S. Ct. 681 (2009) ..... *passim*
Ex parte Johnson,
12 S.W.3d 472 (Tex. Crim. App. 2000) 54
Kircher v. *Putnam Funds Trust*,
547 U.S. 633 (2006) 35
Lawrence v. *Florida*, 549 U.S. 327 (2007) 3, 55
Miller-El v. *Cockrell*, 537 U.S. 322 (2003) ..... *passim*
Mohawk Indus., Inc. v. *Carpenter*,
130 S. Ct. 599 (2009) 16
O'Sullivan v. *Boerckel*,
526 U.S. 838 (1999) 31, 32
Payton v. *New York*, 445 U.S. 573 (1980) 24
Riddle v. *Kemna*,
523 F.3d 850 (8th Cir. 2008) 4, 39, 41
Roberts v. *Cockrell*,
319 F.3d 690 (5th Cir. 2003) ..... *passim*
Slack v. *McDaniel*, 529 U.S. 473 (2000) ..... *passim*
Smith v. *Barry*, 502 U.S. 244 (1992) 21, 22, 23
Snook v. *Wood*, 89 F.3d 605 (9th Cir. 1996) 57
Soto v. *United States*,
185 F.3d 48 (2d Cir. 1999) 20
Steel Co. v. *Citizens for a Better Env't*,
523 U.S. 83 (1998) 36
Tiedeman v. *Benson*,
122 F.3d 518 (8th Cir. 1997) 19
Ex parte Torres,
943 S.W.2d 469 (Tex. Crim. App. 1997) 33
Torres v. *Oakland Scavenger Co.*,
487 U.S. 312 (1988) 5, 21, 22
United States v. *Corrick*, 298 U.S. 435 (1936) 36
United States v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) 18, 19

United States v. *Plascencia*,
537 F.3d 385 (5th Cir. 2008) 57
United States v. *Prows*,
448 F.3d 1223 (10th Cir. 2006) 57
Waterville v. *Van Slyke*, 116 U.S. 699 (1886) 23
Young v. *United States*,
124 F.3d 794 (7th Cir. 1997) 20

Constitution, statutes, and rules:

U.S. Const. art. II, sec. 3 14
U.S. Const. amend. IV 24
19 U.S.C. 1602 18
19 U.S.C. 1603 18
19 U.S.C. 1604 18
28 U.S.C. 1254(1) 36
28 U.S.C. 1257(a) 56, 57
28 U.S.C. 1291 16
28 U.S.C. 1331 15
28 U.S.C. 2244(d) ..... *passim*
28 U.S.C. 2253(c) ..... *passim*
28 U.S.C. 2254(b) 38
28 U.S.C. 2254(c) 52
28 U.S.C. 2254(d) 29
28 U.S.C. 2254(e) 30
28 U.S.C. 2255(f) ..... *passim*
Fed. R. App. P. 3(c)(1) 20, 21, 22, 23
Tex. R. App. P. 18.1 54

Miscellaneous:

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*,
38 U. Chi. L. Rev. 142 (1970) 27

Nancy J. King & Joseph L. Hoffmann, *Habeas for the Twenty-First Century* (2011) 27

Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157 (1953) 15

In the Supreme Court of the United States

No. 10-895

RAFAEL ARRIAZA GONZALEZ, PETITIONER

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

1. After a Texas jury convicted petitioner Rafael Gonzalez of murder, he appealed, claiming that the State had violated his speedy-trial rights. J.A. 208-234. On July 12, 2006, the Court of Appeals for the Fifth District of Texas rejected his speedy-trial claim and affirmed his conviction. J.A. 190-207; Pet. App. 2a. Gonzalez declined to file a petition for discretionary review with the Texas Court of Criminal Appeals (CCA), the State's highest court in criminal cases. *Ibid.* The window for filing that petition closed on August 11, 2006. *Ibid.* On September 26, 2006, the intermediate state court issued the mandate from its ruling affirming Gonzalez's conviction. J.A. 188-189; Pet. App. 2a.

2. On July 19, 2007, Gonzalez filed a state habeas application, presenting three new claims.

J.A. 69-86; Pet. App. 2a. First, he accused a state witness of lying to police and tampering with evidence. J.A. 76-77. Second, he accused his lawyers of ineffective assistance. *Id.* at 78-79. Third, he argued that the evidence was insufficient to support his conviction. *Id.* at 80-84. Gonzalez did not raise his speedy-trial claim in the state habeas application, see *id.* at 69-86, and the state habeas courts did not rule on it, see *id.* at 124-133. The state trial court denied habeas relief, and the CCA followed suit on November 21, 2007. *Id.* at 133.

3. On January 24, 2008, Gonzalez filed a federal habeas application. J.A. 134-146; Pet. App. 2a. Gonzalez raised four constitutional claims, including a speedy-trial claim. J.A. 142-145. Respondent Rick Thaler, Director of the Texas Department of Criminal Justice's Correctional Institutions Division (the Director), opposed federal habeas relief on several grounds, including untimeliness, failure to exhaust, and procedural default. Pet. App. 13a.

The federal habeas statute imposes a one-year statute of limitations. 28 U.S.C. 2244(d). For Gonzalez, this one-year clock started on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). The district court ruled that the limitations period began running on August 11, 2006—the date of "the expiration of the time for seeking [direct] review"—and dismissed Gonzalez's application as time-barred. Pet. App. 9a-21a.

Had the district court instead started the clock on September 26, 2006—the date on which the intermediate state court issued its mandate—Gonzalez's application would have been timely. But

Fifth Circuit precedent held that when prisoners fail to pursue direct appeals all the way to the Supreme Court of United States, the one-year clock must start at "the expiration of the time for seeking [direct] review." See *Roberts* v. *Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). The "conclusion of direct review" prong in section 2244(d)(1)(A) comes into play only "when the Supreme Court either rejects the petition for certiorari or rules on its merits." *Ibid.* The district court followed *Roberts* and dismissed the application.

4. Gonzalez filed a timely notice of appeal and requested a certificate of appealability (COA) from the district court. J.A. 155-158. The district court declined to issue a COA. *Id.* at 162-164. Gonzalez applied for a COA from the Fifth Circuit, raising only the statute-of-limitations issue and the speedy-trial claim. *Id.* at 175. A circuit judge approved Gonzalez's request to appeal, and issued a document stating (in pertinent part):

> A COA is GRANTED as to the question whether *Roberts* has been overruled by *Lawrence* [v. *Florida*, 549 U.S. 327 (2007)], and, if so, whether the habeas application was timely filed because Gonzalez's conviction became final, and thus the limitation period commenced, on the date the intermediate state appellate court issued its mandate.

J.A. 347.

This document fails to "indicate which specific issue or issues" amount to "a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. 2253(c)(2)-(3). But the Director did not

object to this putative COA, and the Fifth Circuit entertained Gonzalez's appeal without discussing the document's noncompliance with section 2253(c).

5. On the merits, the Fifth Circuit reaffirmed *Roberts*, holding that when a habeas applicant fails to seek direct review from the State's highest court, the one-year limitations period always begins at "the expiration of the time for seeking [direct] review," rather than at "the conclusion of direct review." See Pet. App. 4a-8a. The Fifth Circuit's construction of section 2244(d) differs from the Eighth Circuit's opinion in *Riddle* v. *Kemna*, 523 F.3d 850 (8th Cir. 2008), which applies a later-in-time rule to the separate starting points described in section 2244(d)(1)(A). In the Eighth Circuit, a habeas applicant who fails to seek direct review from the State's highest court may start the one-year clock from either "the conclusion of direct review"—which the Eighth Circuit equates with the date on which the intermediate state court issues its mandate—or "the expiration of the time for seeking such review," whichever is later. See *id.* at 856. This Court granted certiorari.

SUMMARY OF ARGUMENT

Postconviction habeas proceedings impose enormous costs on the federal courts and on state governments. The COA mechanism controls these costs by screening out appeals that have no chance of success, and limiting appellate review to habeas applicants who make a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Faithful enforcement of these statutory and doctrinal limits on habeas appeals is essential to making federal postconviction review both cost-

effective and politically sustainable. Accordingly, this Court has regarded the COA as a jurisdictional prerequisite to an appeal. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 335-336 (2003).

But not every document that purports to authorize a habeas appeal will qualify as a "certificate of appealability" under section 2253(c). While section 2253(c)(1)(A) requires a state prisoner to obtain a "certificate of appealability" before he can appeal a denial of habeas relief, section 2253(c)(3) provides that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues" qualify as the substantial constitutional claim required by section 2253(c)(2). The document issued by the circuit judge in this case mentions only the statute-of-limitations issue; it does not indicate *any* constitutional claims. It therefore omits the one thing that Congress has declared that a COA "shall" contain. This document cannot qualify as a "certificate of appealability" under section 2253(c), and cannot confer appellate jurisdiction on the Fifth Circuit. It is as facially invalid as a purported "notice of appeal" that omits the names of the parties taking the appeal, see *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), or a purported "search warrant" that omits a description of the evidence to be seized, see *Groh* v. *Ramirez*, 540 U.S. 551 (2004).

Although the Fifth Circuit lacked jurisdiction over Gonzalez's appeal, it correctly applied the statute of limitations when it deemed Gonzalez's claims time-barred. Section 2244(d)(1)(A) provides two definitions of "finality": "the conclusion of direct review," and "the expiration of the time for seeking [direct] review." This dual definition of "finality" envisions two discrete categories of cases: those in

which direct review "concludes," and those in which the time for seeking direct review "expires." Gonzalez's case falls into the latter category because he refused to seek direct review in the CCA and allowed the time for seeking that review to "expire." Direct review "concludes," by contrast, when criminal defendants pursue direct review to its natural conclusion in the Supreme Court of the United States, rather than allow their time for direct appeals to expire before reaching this Court. Gonzalez's date of finality is therefore determined solely by the expiration-of-time prong in section 2244(d)(1)(A).

Gonzalez insists that courts must apply the later in time of these two definitions of finality, but Gonzalez misleads the Court by asserting that section 2244(d)(1)(A) defines "finality" by "the latest of" those two dates. Section 2244(d)(1) starts the one-year clock from "the latest of" the four dates provided by subsections 2244(d)(1)(A) through (D), but it does not define the date of "finality" in subsection (A) by the later of the two prongs listed within that subsection. Gonzalez's construction of section 2244(d)(1)(A) is also impossible to reconcile with this Court's opinions in *Clay* v. *United States*, 537 U.S. 522 (2003), and *Jimenez* v. *Quarterman*, 129 S. Ct. 681 (2009). Finally, Gonzalez's proposed interpretation will needlessly complicate the task of determining "the conclusion of direct review," by requiring federal habeas courts to apply state-law notions of finality that will vary among States and that may not be clear from the rulings of a state supreme court.

ARGUMENT

I. THE FIFTH CIRCUIT LACKED JURISDICTION TO ADJUDICATE GONZALEZ'S APPEAL

The circuit judge committed two errors in issuing the putative COA. J.A. 346-347. He first erred by failing to "indicate" a substantial constitutional claim in the document that purports to authorize Gonzalez's appeal. Section 2253(c)(1)(A) requires a state prisoner to obtain a "certificate of appealability" before appealing, and section 2253(c)(3) requires that "the certificate of appealability under paragraph (1) *shall indicate* which specific issue or issues" make a substantial showing of the denial of a constitutional right. (Emphasis added.) The document issued by the circuit judge in this case fails to indicate *any* constitutional claims, so it cannot qualify as a "certificate of appealability" under section 2253(c)—even though it purports to authorize Gonzalez's appeal. And the Fifth Circuit cannot assert jurisdiction over Gonzalez's appeal until a circuit justice or judge issues a "certificate of appealability," which the statute defines as a document that complies with section 2253(c)(3).

The circuit judge also erred by approving the COA application despite Gonzalez's failure to exhaust the only constitutional claim presented in his COA request. Gonzalez never presented his speedy-trial claim to the CCA, either on direct appeal or in the state habeas proceedings, and this failure to exhaust presents an insurmountable doctrinal obstacle to habeas relief. Even though Gonzalez believes that his speedy-trial claim presents a substantial constitutional issue, the requirement

that habeas applicants make a "substantial showing of the denial of a constitutional right" is only a necessary and not a sufficient condition to the issuance of a COA. See 28 U.S.C. 2253(c)(2); *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003). *Slack* and *Miller-El* compelled the circuit judge to deny a COA to Gonzalez unless reasonable jurists could debate whether "the petition should have been resolved in a different manner," and the Director's unassailable exhaustion defense precludes any judge from making that finding. *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336. But a circuit judge does not exceed his "jurisdiction" by granting a COA that he should have denied. A rule is "jurisdictional" only if it governs a court's adjudicatory capacity, and section 2253(c)(1) plainly authorizes "a circuit justice or judge" to decide whether to issue a COA. In this case, the circuit judge committed legal error by approving a COA request in the teeth of a doctrinal prohibition, but he did not exceed his jurisdiction, because he did not rule on something on which he had no prerogative to rule.

When the Court granted certiorari, it directed the parties to address the following question: "Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal?" *Gonzalez* v. *Thaler*, 131 S. Ct. 2989 (2011). Part I.A, *infra*, explains that the Fifth Circuit lacked jurisdiction to adjudicate Gonzalez's appeal. Part I.B, *infra*, explains that the circuit judge should not have issued the putative COA, but he did not exceed his jurisdiction with this erroneous legal decision. Part I.C, *infra*, explains how all of this informs the proper disposition of this case.

A. The Fifth Circuit Lacked Jurisdiction Over Gonzalez's Appeal Because The Circuit Judge Failed To Issue A "Certificate Of Appealability" Within The Meaning Of Section 2253(c)

Section 2253(c)(1)(A) requires a state prisoner to obtain a COA before he can appeal a district court's denial of habeas relief. See 28 U.S.C. 2253(c)(1)(A) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from[] the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]"). Gonzalez concedes, as he must, that the issuance of a COA is a jurisdictional prerequisite to an appeal. Pet. Br. 14; see *Miller-El*, 537 U.S. at 336 ("[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.").

But a habeas applicant cannot establish appellate jurisdiction merely by obtaining a document that purports to authorize his appeal. Rather, he must secure a "certificate of appealability"—a legal term of art defined in section 2253(c). For a document to qualify as a "certificate of appealability," it must satisfy two criteria. First, it must be issued by "a circuit justice or judge." 28 U.S.C. 2253(c)(1). Second, it "shall indicate which specific issue or issues" make a substantial constitutional claim. 28 U.S.C. 2253(c)(3). A document that fails either of these requirements is not a "certificate of appealability" under section 2253(c)—even if it purports to authorize an appeal, and even if it calls itself a "certificate of appealability." The putative COA in this case fails the second of these requirements, so this Court should vacate the Fifth

Circuit's judgment and remand the cause with instructions to dismiss the appeal for lack of jurisdiction.

Before delving into the statutory text, we think it important to dispel the images of courtroom doors closing on the fingers of hapless litigants, images that Gonzalez and his amici repeatedly invoke in their briefs. Pet. Br. 12, 31-32; NACDL Amicus Br. 8. Gonzalez would have this Court believe that a jurisdictional dismissal of his appeal will cause anyone who obtains a defective COA to lose forever his opportunity to appeal an adverse habeas ruling. But no provision of law prevents a habeas applicant with a defective COA from securing a new COA and launching another appeal. And we do not seek any remedy from this Court that would foreclose applicants from seeking a new COA that complies with section 2253(c)(3) and then pursuing an appeal if they are able to obtain that document. If Gonzalez is unable to persuade a circuit justice or judge to issue a compliant COA, that will happen only because his constitutional claims are nonsubstantial, or because the Director's exhaustion argument (see Part I.B.2, *infra*) so clearly bars habeas relief that an appeal would be pointless—not because some circuit judge goofed by failing to indicate a constitutional claim in the first go-around.

1. The text and structure of the statute show that a document that fails to "indicate" a constitutional claim cannot qualify as a "certificate of appealability" under section 2253(c)

Gonzalez argues that the Fifth Circuit had jurisdiction over his appeal "because a circuit judge issued petitioner a certificate of appealability." Pet. Br. 14. That begs the question. The very issue in

this case is whether the document issued by the circuit judge qualifies as a "certificate of appealability" when it omits the one thing that Congress has declared a COA "shall" contain. Answering that question requires more than the conclusory assertions that Gonzalez offers throughout his brief, and analysis must begin with the text of section 2253(c):

> (1) *Unless a circuit justice or judge issues a certificate of appealability*, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) *The certificate of appealability under paragraph (1) shall indicate* which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. 2253(c) (emphases added). Paragraph (1) establishes the basic rule: No jurisdiction exists over appeals by habeas applicants "[u]nless a circuit justice or judge issues a certificate of appealability." Paragraph (2) limits the circumstances under which a COA may issue: The applicant must, at an absolute minimum, make "a substantial showing of

the denial of a constitutional right." Finally, paragraph (3) requires that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy" paragraph (2).

Paragraph (1)'s jurisdictional rule makes clear that it is not enough for habeas applicants to obtain a piece of paper with the words "certificate of appealability." First, the COA must be issued by a "circuit justice or judge." A COA issued by a prisoner's cellmate would not confer appellate jurisdiction, even if it indicated a substantial constitutional claim. Second, paragraph (1) requires that the document *be* a "certificate of appealability." Gonzalez treats paragraph (1) as if it said, "Unless a circuit justice or judge issues *a document containing the words 'certificate of appealability,'*" or perhaps, "Unless a circuit justice or judge issues *a document purporting to authorize an appeal.*" But that is not what paragraph (1) says. It calls for a "certificate of appealability," which is a legal term of art. Whether a particular document qualifies as a "certificate of appealability" is not to be determined by the nomenclature of the document, but by its content.

Paragraph (3) provides that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." At least two features of the statutory language demonstrate that this provision establishes a jurisdictional prerequisite to an appeal. First, in describing the contents of a COA, paragraph (3) refers back to paragraph (1), a provision that even Gonzalez concedes is phrased in jurisdictional terms. Pet. Br. 14 ("The plain text of AEDPA Section 2253(c)(1) makes the issuance of a certificate of appealability a jurisdictional

precondition to appellate review because it says that 'an appeal may not be taken' without it."). As paragraph (3) references paragraph (1)'s jurisdictional requirement, and specifically describes the COA required by that earlier paragraph, it is as though paragraph (1) had provided: "Unless a circuit justice or judge issues a certificate of appealability *that shall indicate the specific issue or issues that satisfy the showing required by paragraph (2)*, an appeal may not be taken to the court of appeals[.]" No different result should obtain because AEDPA's drafters made section 2253(c) more readable by breaking paragraph (3)'s requirement into a discrete provision that refers back to the jurisdictional rule established in paragraph (1).

The second important textual clue is the auxiliary verb "shall." By declaring that "[t]he certificate of appealability under paragraph (1) *shall indicate* which specific issue or issues satisfy the showing required by paragraph (2)," paragraph (3) defines the essential characteristic of a COA. Whenever one describes a legal concept or thing by saying it "shall" have a particular attribute, that attribute becomes a necessary condition for the concept or thing to exist. If a law provides that "an eligible voter *shall be* 18 years of age or older," the contrapositive follows as a matter of logic: Anyone who has not reached the age of 18 cannot be an eligible voter. Paragraph (3) is no different. When it provides that a COA under paragraph (1) "shall indicate" the specific issue or issues that satisfy the showing required by paragraph (2), the contrapositive is logically impossible to escape. A document that fails to indicate a substantial constitutional claim cannot

qualify as a "certificate of appealability under paragraph (1)."

Of course, context always matters when interpreting the word "shall." When Article II, section 3 of the Constitution says that the President "*shall* from time to time give the Congress Information of the State of the Union," that does not mean that a President who shirks this duty ceases to be President of the United States. But in this context "shall" is deployed as a command directed to a person; it is being used in an imperative rather than an existential sense. See U.S. Const. art. II, sec. 3 ("*He* shall from time to time give * * * ." (emphasis added)). When "shall" is used to describe the contents of a document, or the characteristics of a legal term of art, it cannot be passed off as mere exhortation. Gonzalez would have an easier time if paragraph (3) said, "*The circuit justice or judge who issues the certificate of appealability shall indicate* which specific issue or issues satisfy the showing required by paragraph (2)." But paragraph (3) is not phrased as a command to a judge; instead, it defines what a "certificate of appealability" is.

Gonzalez does not confront any of this statutory language when discussing paragraph (3) in his brief. See Pet. Br. 25-29. His analysis opens with an inaccurate paraphrase of the statute; he writes that "[s]ection 2253(c)(3) provides that, when issuing a certificate of appealability, *the court* 'shall indicate' which issues *it determined* to be eligible for appellate review." Pet. Br. 25 (emphases added); see also NACDL Amicus Br. 13 (describing paragraph (3) as "directed at the issuing judge"). But paragraph (3) is not phrased as a directive to judicial personnel. It describes what a "certificate of appealability" "shall"

contain. By changing the subject of paragraph (3) from the certificate to the court, Gonzalez is attempting to characterize the problem as mere human error rather than the failure of the *document* to meet the statutory definition of "certificate of appealability."

Having subordinated the text and structure of paragraph (3) to his careless paraphrase, Gonzalez offers four reasons for declining to treat paragraph (3)'s requirement as a precondition to appellate jurisdiction. His lead argument is that the verb "indicate" presents a "less stringent statutory directive than to identify or specify" and therefore "lacks the precision and specificity that would normally be associated with jurisdiction-defining directives." Pet. Br. 25-26. Yet paragraph (3) requires a COA to indicate the "*specific* issue or issues" that qualify as substantial constitutional claims. Apparently Gonzalez believes that a statutory requirement to "*specify* the issue or issues" would represent a jurisdictional prerequisite to an appeal, while a requirement to "*indicate which specific* issue or issues" does not. That paragraph (3)'s specificity requirement takes the form of an adjective rather than a verb hardly seems an issue of legal or jurisdictional significance.

In all events, we fail to see any causal relationship between the "precision and specificity" of a statutory provision and the jurisdiction-defining nature of that provision. The meaning of "arising under" federal law in 28 U.S.C. 1331 is notoriously vague and imprecise; courts and commentators have wrestled for more than a century over what this phrase means. See, *e.g.*, Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 Colum.

L. Rev. 157, 160-165 (1953). The requirement of a "final decision[]" before appeal in 28 U.S.C. 1291 is also imprecise in many regards. See, *e.g.*, *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 603-606 (2009) (discussing collateral-order doctrine). The test for whether section 2253(c)(3) is "jurisdictional" depends not on its "precision and specificity," but on whether the text and structure of that provision describe a limitation on a court's authority to resolve the merits on an appeal. Paragraph (3) satisfies this test by defining the essential attribute of a "certificate of appealability" and linking its requirement to the jurisdictional rule established in paragraph (1).

Gonzalez's second argument is that reviewing courts should overlook a putative COA's failure to mention a constitutional claim, by "construing the certificate as necessarily indicating the constitutional issue for which the petitioner made a 'substantial showing' in his application." Pet. Br. 27. This effectively reads section 2253(c)(3) out of the U.S. Code. If an appellate court can reach out to identify a "substantial" constitutional claim whenever the COA fails to do so, then section 2253(c)(3)'s requirement that the *certificate* identify the "specific" constitutional issues is no longer a requirement. The entire point of section 2253(c)(3) is to identify all substantial constitutional issues before an appeal is taken, to avoid wasting resources in litigation that cannot be expected to yield habeas relief. See *Slack*, 529 U.S. at 485 (noting that "[e]ach component of the § 2253(c) showing is part of a threshold inquiry"). Allowing the "indicat[ion]" to wait until the appeal is decided will induce the State to defend all claims out of an abundance of caution,

and force the reviewing court to consider all claims that the parties brief and argue before designating one or more constitutional claims as "substantial"—or perhaps designating none at all.

Gonzalez's proposal also spurns the statutory division of authority between the "circuit justice or judge" and the appellate-court panel that will decide the merits of the appeal. Under section 2253(c), the "circuit justice or judge" must decide whether a habeas applicant has made a "substantial showing of the denial of a constitutional right" *before* an appeal may be taken. After the COA issues, the merits panel decides only whether the substantial constitutional claims indicated in the COA merit habeas relief. Under Gonzalez's interpretation, the "circuit justice or judge" decides simply whether to authorize an appeal. If he issues a COA without flagging a substantial constitutional claim, the task falls to the merits panel to examine the entire record and determine in hindsight whether the "substantial showing of the denial of the constitutional right" requirement had been met. Gonzalez's approach to habeas appeals is doubly usurpative. It first allows the "circuit justice or judge" to authorize appeals in violation of section 2253(c). Then, after permitting those appeals to be taken, it allows the merits panel, rather than the "circuit justice or judge," to decide whether the appeal should have been allowed in the first place. This bears no resemblance to the arrangement that Congress established in section 2253(c).

Third, Gonzalez asserts that paragraph (3) fails to employ "jurisdictional terms." But paragraph (1) *is* phrased as a jurisdictional restriction, and paragraph (3) not only refers back to paragraph (1)

but also defines the characteristics of the legal term of art that appears in that jurisdictional provision. See 28 U.S.C. 2253(c)(3) ("*The certificate of appealability under paragraph (1)* shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." (emphasis added)). Gonzalez acknowledges that the language of paragraph (1) establishes a "jurisdictional precondition to appellate review," Pet. Br. 14, but he does not analyze the relationship between paragraphs (1) and (3), and he ignores the fact that paragraph (3) defines the very "certificate of appealability" that paragraph (1) requires as a jurisdictional prerequisite to an appeal.

Gonzalez also errs by describing paragraph (3) as a mere provision "intended for the guide of officers" that "do[es] not limit their power." Pet. Br. 28 (quoting *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)). As we have noted, the subject of paragraph (3) is the COA itself—not the judicial officer who decides whether to issue it. The timing rules in *Good*, by contrast, were statutory commands addressed specifically to officers. See, *e.g.*, 19 U.S.C. 1602 ("*It shall be the duty of any officer, agent, or other person* authorized by law to make seizures of merchandise or baggage * * * to report every such seizure * * *." (emphasis added)); 19 U.S.C. 1603 ("*[I]t shall be the duty of the appropriate customs officer* to report promptly such seizure or violation * * *." (emphasis added)); 19 U.S.C. 1604 ("*It shall be the duty of the Attorney General of the United States* immediately to inquire into the facts of cases reported to him * * *." (emphasis added)). These provisions did not purport to describe the essential characteristic of a document

necessary for appellate jurisdiction. Section 2253(c)(3) does.

Finally, Gonzalez asserts that "nothing in subsection (c)(3) 'specif[ies] a consequence for noncompliance with' its dictate." Pet. Br. 28 (quoting *Dolan* v. *United States*, 130 S. Ct. 2533, 2539 (2010) (quoting *Good*, 510 U.S. at 63)). But paragraph (3) does not need to repeat the consequence previously spelled out in paragraph (1): If a habeas applicant does not obtain a "certificate of appealability"—one that "shall indicate" a substantial constitutional claim—then "an appeal may not be taken to the court of appeals."

Our jurisdictional contentions do *not* require courts to vacate or re-examine all wrongly issued COAs, but only those defective documents that omit the contents that "certificate[s] of appealability" are required to contain. The correctness of a COA's "substantial[ity]" finding is not an issue of jurisdictional significance, so long as the COA "indicate[s]" a specific finding of a "substantial showing of the denial of a constitutional right." See, *e.g.*, *Tiedeman* v. *Benson*, 122 F.3d 518, 522 (8th Cir. 1997) (vacating a putative COA for omitting the content required by section 2253(c)(3), while noting that a wrongly issued COA can nevertheless confer appellate jurisdiction "if regular on its face and not procedurally defective"). The concerns that our jurisdictional contentions will "waste[] judicial resources" are therefore overblown. NACDL Amicus Br. 12. The jurisdictional defects that we describe will be obvious on the face of the putative COA; enforcing section 2253(c)(3) will be no more wasteful or burdensome than enforcing the jurisdictionally mandated contents of a notice of appeal. See Part

I.A.2, *infra*. Some courts of appeals have echoed these concerns, but those courts fail to appreciate the distinction between reviewing the document's compliance with section 2253(c)(3) and reviewing a judge's earlier decision to issue a COA. See, *e.g.*, *Young* v. *United States*, 124 F.3d 794, 799 (7th Cir. 1997) (rejecting the notion that appellate-jurisdiction doctrines impose "[a]n obligation to determine *whether a certificate should have been issued*" (emphasis added)); *Soto* v. *United States*, 185 F.3d 48, 52 (2d Cir. 1999) ("[A] certificate of appealability *that is issued erroneously* nevertheless suffices to confer appellate jurisdiction under § 2253." (emphasis added)). In all events, none of those courts addressed the textual arguments we have presented for treating section 2253(c)(3) as a jurisdictional requirement, and the policy considerations on which those courts relied cannot prevail when the jurisdictional view represents the most plausible interpretation of statutory text and structure.

2. The required contents of a COA are no less "jurisdictional" than the required contents of a notice of appeal

The jurisdictional nature of section 2253(c)(3)'s requirement is confirmed by rulings from this Court regarding the contents of a notice of appeal. Like the COA, the notice of appeal serves as a jurisdictional prerequisite to an appeal. Without it, the federal courts of appeals lack jurisdiction and are powerless to take any action in a case. See, *e.g.*, *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982). And Rule 3(c)(1) of the Federal Rules of Appellate Procedure, like section 2253(c)(3), describes what a notice of appeal "must" contain:

> The notice of appeal must:
>
> > (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice * * *;
> >
> > (B) designate the judgment, order, or part thereof being appealed; and
> >
> > (C) name the court to which the appeal is taken.

Fed. R. App. P. 3(c)(1). This Court has consistently held that a document that omits any of the contents required by Rule 3(c)(1) cannot serve as the "notice of appeal" needed to confer jurisdiction on a court of appeals. A purported "certificate of appealability" that lacks the content required by section 2253(c)(3) is no more capable of bestowing appellate jurisdiction.

In *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), for example, an appellant filed a putative notice of appeal that failed to include his name, due to a clerical error committed by his attorney's secretary. The Court held that this defect was fatal to appellate jurisdiction. See *id.* at 317 ("[P]etitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed. * * * Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal."). And in *Smith* v. *Barry*, 502 U.S. 244 (1992), the Court reiterated that *all* of the contents required by Rule 3(c)(1) represent jurisdictional prerequisites to an appeal. See *id.* at 248 ("Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review."). If Gonzalez maintains that section 2253(c)(3)'s requirement is nonjurisdictional,

then he must find some way to defeat this symmetry between the required contents of a COA and the required contents of a notice of appeal.

Although Gonzalez acknowledges *Torres* and *Smith*, he cites them for the following proposition:

> What is jurisdictionally critical is that a notice of appeal with the bare minimum of identifying information be timely filed. Other components, while required by rule, *see* Fed. R. App. P. 3(c), can be omitted without jurisdictional consequence. *See, e.g., Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316–17 (1988) (notice of appeal vests jurisdiction if it is "the functional equivalent of what the rule requires" and is therefore jurisdictionally sufficient); *accord Smith v. Barry*, 502 U.S. 244, 248 (1992).

Pet. Br. 23. Gonzalez's assertion that Rule 3(c)'s requirements "can be *omitted* without jurisdictional consequence," *ibid.* (emphasis added), is flatly contradicted by both *Torres* and *Smith*. Each of those decisions recognizes that courts should liberally construe the requirements of Rule 3 and accept documents that convey the "functional equivalent of what the rule requires." See *Torres*, 487 U.S. at 317; *Smith*, 502 U.S. at 248. But there is a chasm between that spirit of liberality and a license to *omit* information required by Rule 3 without jurisdictional consequence. See *Torres*, 487 U.S. at 317 ("[A]lthough a court may construe the Rules liberally in determining whether they have been complied with, *it may not waive the jurisdictional requirements* of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they

have not been met." (emphasis added)); *Smith*, 502 U.S. at 248 ("This principle of liberal construction does not, however, excuse noncompliance with the Rule. * * * Although courts should construe Rule 3 liberally when determining whether it has been complied with, *noncompliance is fatal to an appeal.*" (emphasis added)). No amount of "liberal construction" can make Gonzalez's putative COA compliant with section 2253(c)(3). It does not mention *anything* resembling a specific constitutional issue, nor does it convey the "functional equivalent" of what section 2253(c)(3) requires.

Omitting the required content from a notice of appeal deprives the court of appeals of jurisdiction. Gonzalez's task is to explain why a different regime should govern COAs—not to assert that omissions from a notice of appeal lack jurisdictional significance when this Court's cases emphatically reject that notion.[1]

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[1] Other rulings from this Court have regarded omissions of required contents from jurisdictionally indispensable documents as fatal. See, *e.g.*, *Columbus Watch Co.* v. *Robbins*, 148 U.S. 266, 269-270 (1893) (dismissing certificate from a federal appellate court that sought to certify question, after finding the certificate "not in compliance with the statute" because it "does not specifically set forth the question or questions to be answered, and, apart from that, it does not state that instruction is desired for the proper decision of such question or questions"); *Waterville* v. *Van Slyke*, 116 U.S. 699, 700, 703-704 (1886) (dismissing a certificate of division of opinion because this Court "did not see that any distinct question of law is stated on which the judges differed").

3. A document that fails to "indicate" a constitutional claim cannot serve the evidentiary function of a COA

By requiring COAs to indicate a substantial constitutional claim, section 2253(c)(3) is designed to train the judge's attention on the constitutional issues in the case and provide written evidence that he found one or more them to be "substantial." Section 2253(c)(3) thus serves an evidentiary function much like the particular-description requirement of the Fourth Amendment's Warrant Clause. This Court has long held that the police must obtain a search warrant before searching a suspect's home, see *Payton* v. *New York*, 445 U.S. 573, 586 (1980), and the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched, and the persons or things to be seized*," U.S. Const. amend. IV (emphasis added). But when a magistrate issues a warrant that omits a particular description of the evidence sought, the Court treats the warrant as void and the search as warrantless—even if the warrant complies with the other constitutional requirements.

In *Groh* v. *Ramirez*, 540 U.S. 551 (2004), the warrant failed to provide any description of the type of evidence sought. *Id.* at 557. When police officers used this defective warrant to search a suspect's home, this Court held them liable for conducting a "warrantless" (and hence "unreasonable") search. The officers noted that the defective warrant was supported by probable cause and a sworn affidavit that described with particularity the items to be seized, and argued that their search was therefore

"functionally equivalent to a search authorized by a valid warrant." *Id.* at 558. But this Court would have none of it, refusing even to extend qualified immunity to the officers' actions:

> [T]he warrant did not describe the items to be seized *at all*. In this respect the warrant was *so obviously deficient that we must regard the search as "warrantless" within the meaning of our case law.*
>
> [* * *]
>
> [U]nless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), *there can be no written assurance that the Magistrate actually found probable cause* to search for, and to seize, every item mentioned in the affidavit. * * * The mere fact that the Magistrate issued a warrant does not necessarily establish that he agreed that the scope of the search should be as broad as the affiant's request.

Id. at 558, 560-561 (second and third emphases added).

The omission of a constitutional claim from Gonzalez's putative COA is as fatal as the omission of a description of the evidence to be seized in the *Groh* search warrant. When a putative COA fails to identify *any* of the habeas applicant's constitutional claims, there is no "written assurance" that the judge who authorized the appeal even considered the minimum standard provided in section 2253(c)(2), just as there was no "written assurance" that the

magistrate in *Groh* found probable cause to search for the items mentioned in the affidavit. Courts cannot take it on faith that the circuit justice or judge deemed the constitutional claims in a prisoner's COA application "substantial," any more than the police can assume that a magistrate found probable cause to search for items mentioned in an officer's affidavit. And a document that lacks written evidence that "a circuit justice or judge" determined that an appeal presents a "substantial showing of the denial of a constitutional right" cannot confer jurisdiction on a federal appellate court, any more than a warrant that lacks written evidence that a magistrate found probable cause can insulate a police officer from a lawsuit.

B. The Circuit Judge Erred By Purporting To Issue A COA, But He Did Not Exceed His Jurisdiction

Section 2253(c)(2) provides that "[a] certificate of appealability *may* issue under paragraph (1) *only if* the applicant has made a substantial showing of the denial of a constitutional right." (Emphases added.) This "substantial showing" requirement is only the minimum showing necessary to obtain a COA—it does not entitle a litigant to a COA. Many habeas applicants, for example, can make "a substantial showing of the denial of a constitutional right" even when that constitutional claim encounters an insurmountable procedural obstacle. Yet this Court has long recognized that COAs should not issue in those situations. See, *e.g.*, *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336; cf. *Barefoot* v. *Estelle*, 463 U.S. 880, 893 & n.4 (1983).

Gonzalez asserts that his speedy-trial claim makes a "substantial showing of the denial of a

constitutional right," but he cannot obtain habeas relief on that claim because of his clear failure to exhaust. There is no point in allowing this appeal when jurists of reason would agree that Gonzalez has no chance of obtaining habeas relief on his constitutional claims—even though his case presents an interesting statute-of-limitations question.

Indeed, the need to preclude litigants such as Gonzalez from appealing serves the interests of not only the States but also prisoners. No one benefits when scarce judicial resources are diverted toward meritless habeas applications and siphoned away from inmates with serious claims of wrongful conviction. See *Brown* v. *Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones."); Nancy J. King & Joseph L. Hoffmann, *Habeas for the Twenty-First Century* 81 (2011) (reporting that non-capital habeas has become a "costly charade" because the percentage of meritorious filings is "very close to zero").[2]

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[2] We are nonplussed that Gonzalez's amici, who assert a desire to "vindicate the rights of prisoners who may be actually innocent of the charges for which they were convicted," NACDL Amicus Br. 1-2, would want a regime in which Gonzalez could appeal his clearly unexhausted claim, a claim that cannot possibly lead to habeas relief and that will serve only to steer appellate-court resources away from prisoners with credible claims of innocence. See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 149 (1970) (reflecting that Justice Jackson's observation in *Brown* "may be distasteful but no judge can honestly deny it is real").

1. Under Slack *and* Miller-El, *a COA should not issue where a "substantial" constitutional claim is clearly barred on procedural grounds*

Slack forbids a judge to issue a COA if the district court denied relief on unassailable procedural grounds—even if the habeas applicant can satisfy section 2253(c)(2) by making a "substantial showing of the denial of a constitutional right." In cases where a district court denies habeas relief on procedural grounds, *Slack* requires that the applicant "show[], *at least*, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484 (emphases and bracketed numbers added). The first requirement represents the minimum showing required by section 2253(c)(2); the second requirement supplements section 2253(c)(2) by limiting COAs to applicants who demonstrate some prospect of ultimately obtaining habeas relief.

The facts of this case differ somewhat from *Slack*, because the district court did not rely on the exhaustion issue when it dismissed Gonzalez's habeas application. Instead, the district court opted to dismiss each of Gonzalez's claims on statute-of-limitations grounds. And given the divergent views of the Fifth and Eighth Circuits, it is safe to conclude that "jurists of reason" could debate the district court's application of the statute of limitations. But Gonzalez is wrong to assert that he can obtain a COA simply by combining this debatable statute-of-limitations issue with a debatable speedy-trial claim. Pet. Br. 13. *Slack* makes clear that its standard for

obtaining a COA represents a floor, not a ceiling—habeas applicants must "show[], *at least*," that reasonable jurists could debate the applicant's substantive constitutional claim as well as the grounds that the district court invoked for its procedural dismissal. *Slack*, 529 U.S. at 478, 484 (emphasis added).

Gonzalez quotes this passage from *Slack* but replaces the italicized language with ellipses. Pet. Br. 13. His efforts to conceal this inconvenient language are understandable, but a litigant's strategic omissions do not convert the *minimum* showing that *Slack* requires for a COA into an *entitlement* to a COA whenever the *Slack* criteria are satisfied. *Slack*'s holding rests instead on a broader proposition: That it is pointless to allow a habeas applicant to appeal a district court's ruling when the applicant has no chance of obtaining habeas relief on his "substantial" constitutional claims. See *Slack*, 529 U.S. at 474 (requiring applicant seeking a COA to show that "reasonable jurists could debate whether * * * *the petition should have been resolved in a different manner* or that the issues presented were 'adequate to deserve encouragement to proceed further'" (quoting *Barefoot*, 463 U.S. at 893 & n.4) (emphasis added)).

Miller-El reflects a similar approach to section 2253(c). When a federal habeas application presents claims that were previously decided by a state court, *Miller-El* instructs the circuit justice or judge to withhold a COA unless jurists of reason could debate the application of section 2254(d)'s relitigation bar to those claims. See *Miller-El*, 537 U.S. at 341 ("[W]e only ask whether the District Court's application of AEDPA deference, as stated in §§ 2254(d)(2) and

(e)(1), to petitioner's *Batson* claim was debatable among jurists of reason."); see also *id.* at 348-350 (Scalia, J., concurring) (defending on textual grounds "the Court's willingness to consider the [AEDPA] limits on habeas relief in deciding whether to issue a [COA]"). *Miller-El* recognizes that there is no sense in allowing an appeal if a provision of the federal habeas statute clearly precludes relief. As Justice Scalia explained:

> A circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief. * * * This approach is consonant with *Slack*, in accord with the COA's purpose of preventing meritless habeas appeals, and compatible with the text of § 2253(c), which does not make the "substantial showing of the denial of a constitutional right" a sufficient condition for a COA.

Id. at 349-350 (Scalia, J., concurring) (citing *id.* at 336 (majority opinion)).

Slack and *Miller-El* require applicants seeking COAs to show that "reasonable jurists could debate whether * * * *the petition should have been resolved in a different manner* or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893 & n.4 (emphasis added)). This means that judges must deny COA requests whenever the prospects of obtaining habeas relief are

nil—either because the constitutional claim is not substantial, or because a substantial constitutional claim is clearly barred on procedural grounds. Cf. *Barefoot*, 463 U.S. at 894 (noting that courts should withhold permission to appeal when a prisoner's "claim is squarely foreclosed by statute, rule or authoritative court decision").

2. Gonzales cannot obtain a COA on his speedy-trial claim because his failure to exhaust that claim is not debatable among jurists of reason

Gonzalez maintains that his speedy-trial claim makes a "substantial showing of the denial of a constitutional right." See Pet. Br. 15-20. But Gonzalez's effort to obtain habeas relief on the speedy-trial claim is a nonstarter because he never presented that claim to the CCA, as required by *Baldwin* v. *Reese*, 541 U.S. 27 (2004), and *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999). Although Gonzalez did present the speedy-trial claim to the intermediate state court, he ceased his direct appeal without presenting this claim to the CCA. The speedy-trial claim is therefore unexhausted. See *Baldwin*, 541 U.S. at 29 (holding that exhaustion requires a state prisoner to "'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review)"); *O'Sullivan*, 526 U.S. at 847 (holding that exhaustion "requir[es] state prisoners to file petitions for discretionary review when that review is part of

the ordinary appellate review procedure in the State").[3]

Gonzalez tries to escape this exhaustion problem by claiming that he "raised" his speedy-trial claim before the CCA in his state habeas proceedings. See Pet. Br. 5; Cert. Reply 10-11. But the habeas application that Gonzalez filed in the CCA never mentions the speedy-trial issue. See J.A. 69-86. His state habeas application lists only three claims: (1) that a state witness lied to police and tampered with the evidence, *id.* at 76-77; (2) that his lawyers gave ineffective assistance, *id.* at 78-79; and (3) that there was insufficient evidence to convict, *id.* at 80-84. The State's response to Gonzalez's state habeas application discusses only those three claims. *Id.* at 99-105. When the state habeas courts denied relief, they addressed only those three claims. See *id.* at 124-133. And in his federal habeas application, Gonzalez listed those same three claims as the "Grounds Raised" in his state habeas application, along with a cryptic note about the speedy-trial claim that was not raised in his state habeas application. See *id.* at 138-139 ("NOTE: speedy trial violation on initial brief (answered by state) [sic]").

Gonzalez offers only two citations to support his assertion that he "raised" the speedy-trial claim in

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[3] Because the crux of the matter is "whether [Gonzalez] has *properly* exhausted," *O'Sullivan*, 526 U.S. at 848, this brief uses "exhaustion" terminology. To be precise, exhaustion doctrine obliged Gonzalez to petition the CCA for discretionary review of his speedy-trial claim, and the expiration of time for filing that petition means his claim is now exhausted but procedurally defaulted. *Ibid.*; *id.* at 853-854 (Stevens, J., dissenting).

the state habeas proceedings. See Pet. Br. 5 (citing J.A. 88, 106). But page 106 of the Joint Appendix is an excerpt of the intermediate state court's opinion *on direct appeal*; the State had attached that opinion as an appendix to its response to Gonzalez's state habeas application. As for page 88 of the Joint Appendix, that is an excerpt of Gonzalez's brief in the state habeas proceedings (not the habeas application itself), and it reads as follows:

> Previous Issues Presented For Review in
> Appellant's Brief No. 05-05-01140-CR
> In the fifth District Court of Appeals
> at Dallas, Texas
>
> I. The appellant was denied his Constitutional Right to a Speedy Trial.

J.A. 88. Gonzalez mentioned the speedy-trial claim in his state-court brief *only to declare that he had previously raised it on direct appeal*. Gonzalez never raised his speedy-trial claim in the state habeas proceedings, and he is mischaracterizing the record and misleading this Court by suggesting otherwise.

What's more, in Texas (as in most States), claims that prisoners raised and lost on direct appeal are generally precluded from relitigation in state habeas proceedings. See *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). Texas recognizes exceptions to this rule if "direct appeal cannot be expected to provide an adequate record to evaluate the claim in question," which is often true for claims involving ineffective assistance of counsel. *Ibid.* But this exception would not encompass Gonzalez's speedy-trial claim; his trial and appellate lawyers had every incentive to develop that claim on direct appeal (and they did). So even if Gonzalez had

asserted the speedy-trial issue for resolution by the state habeas courts, he *still* could not satisfy the exhaustion requirement because he has failed to present his claim "*in a procedurally proper manner* according to the rules of the state courts." *Dupuy* v. *Butler*, 837 F.2d 699, 702 (5th Cir. 1988) (per curiam) (emphasis added). Indeed, by describing the speedy-trial claim as a "Previous Issue[] Presented For Review," Gonzalez's state-court brief *admits* that the claim falls outside the scope of his state habeas application.

As a result, the only constitutional claim on which Gonzalez sought a COA—and the only constitutional claim that he asserts in this Court—is this unexhausted speedy-trial claim, on which Gonzalez has no hope of obtaining habeas relief even if his constitutional arguments are debatable among jurists of reason.

3. A circuit justice or judge would commit legal error by issuing a COA on Gonzalez's speedy-trial claim, but would not exceed jurisdictional limits

Slack and *Miller-El* establish that a circuit justice or judge should not issue a COA when an applicant, like Gonzalez, has no chance of obtaining habeas relief on his constitutional claims. But it does not follow that a circuit justice or judge lacks "jurisdiction" to issue a COA in this situation. A court can commit legal error without exceeding its jurisdiction, and a rule is "jurisdictional" only when it governs a court's adjudicatory capacity. See, *e.g.*, *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202-1203 (2011). There is a crucial distinction between a judge who decides a legal question incorrectly, and a judge who exceeds his "jurisdiction" by adjudicating an

issue that he had no prerogative to rule on one way or the other.

Slack and *Miller-El* restrict a judge's discretion to *grant* COAs, but they do not affect the prerogative of "a circuit justice or judge" to *consider and rule on* COA requests. Accordingly, a circuit justice or judge would not exceed his jurisdiction by issuing a COA in Gonzalez's case, even though he would commit legal error by doing so.

C. Based On The Answer To The First Question Presented, This Court Should Vacate The Fifth Circuit's Judgment And Remand With Instructions To Dismiss For Lack Of Jurisdiction, Without Reaching The Second Question Presented

The analysis in Parts I.A and I.B, *supra*, answers the first of the questions presented, as framed by the Court: "Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal?" *Gonzalez* v. *Thaler*, 131 S. Ct. 2989 (2011). The circuit judge had jurisdiction to issue a COA, although he should have denied Gonzalez's application for a COA. The Fifth Circuit, however, lacked jurisdiction to adjudicate Gonzalez's appeal.

1. This Court should not decide the statute-of-limitations issue because the Fifth Circuit lacked jurisdiction over Gonzalez's appeal

Where, as here, a federal court of appeals lacks jurisdiction, the proper disposition in this Court is to vacate the court of appeals's judgment and remand with instructions to dismiss the appeal. See, *e.g.*, *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 648 (2006); *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 549 (1986).

Gonzalez asserts that this Court should rule on the statute-of-limitations issue "regardless of the court of appeals' jurisdiction." Pet. Br. 32. This astonishing statement contradicts the most basic precepts of federal-court practice.

> Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. On every * * * appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citation and internal quotation marks omitted). To ask this Court to reverse the court of appeals's judgment without first resolving that court's jurisdiction is to invite an act of dereliction and usurpation.

To be clear, this Court's jurisdiction to review the Fifth Circuit's judgment is secure under 28 U.S.C. 1254(1)—even if the Fifth Circuit lacked jurisdiction over Gonzalez's appeal. See, *e.g.*, *United States* v. *Corrick*, 298 U.S. 435, 440 (1936). A jurisdictional shortcoming in an inferior federal court does not deprive the *reviewing* court of jurisdiction, but it does limit the dispositions available to the reviewing court. If the court of appeals lacked jurisdiction to adjudicate an appeal, then this Court must order the appeal dismissed, and it may not proceed to the merits by assuming that appellate jurisdiction exists. See *Steel Co.*, 523 U.S. at 94-95, 101.

None of the cases that Gonzalez mentions support a contrary approach. In *Slack* and *Jimenez*, the

courts of appeals had refused to issue COAs to habeas applicants, and this Court granted certiorari to review those COA denials. There were no questions surrounding the courts of appeals' jurisdiction to rule on the COA requests, and this Court resolved disputed procedural questions because they were relevant to deciding whether the applicants were entitled to COAs. In the cases cited in footnote 9 of Gonzalez's brief, Pet. Br. 31, this Court resolved the merits without discussing or noticing the COA's noncompliance with section 2253(c)(3). At most, these cases might support Gonzalez's claim that noncompliance with section 2253(c)(3) should not be regarded as a "jurisdictional" shortcoming. But they cannot possibly support the notion that this Court can affirm or reverse the court of appeals's judgment without first establishing that the Fifth Circuit had jurisdiction over Gonzalez's appeal.

2. This Court cannot cure the jurisdictional defect in Gonzalez's case by issuing a new COA

Gonzalez asserts that this Court "can issue a certificate of appealability itself," and "could issue a corrected certificate for petitioner if that were deemed necessary to facilitate resolution of the important questions raised by his case." Pet Br. 30. The text of section 2253(c) does not support that view, and in all events Gonzalez's speedy-trial claim is undeserving of a COA because he cannot overcome his failure to exhaust.

Section 2253(c)(1) allows "a circuit justice or judge" to issue a COA; it does not confer this power on the Supreme Court of the United States. Although this Court may use its certiorari

jurisdiction to review and reverse decisions from the courts of appeals denying COA applications, see *Hohn* v. *United States*, 524 U.S. 236 (1998), that does not empower this Court to issue COAs on its own initiative. No one has petitioned for certiorari from the circuit judge's order granting Gonzalez's COA request, so this Court cannot affirm or reverse or modify that order. It can determine only whether that document was sufficient to empower the Fifth Circuit to consider Gonzalez's appeal.

Section 2253(c)(1) allows a single "circuit justice" to issue a COA, but this provision offers little help to Gonzalez. Even if the Circuit Justice for the Fifth Circuit were inclined to provide Gonzalez with a valid COA, that document could not retroactively confer appellate jurisdiction on the Fifth Circuit. The statute requires that an appeal be taken *after* the COA issues, not before. See 28 U.S.C. 2253(c)(1) ("*Unless* a circuit justice or judge issues a certificate of appealability, *an appeal may not be taken* to the court of appeals[.]" (emphases added)). If Gonzalez managed to obtain a new COA from a circuit justice or judge, this Court would still be obligated to vacate the Fifth Circuit's judgment and remand for a fresh set of proceedings in the court of appeals.

In all events, an after-the-fact attempt by Gonzalez to secure a valid COA would run headlong into the Director's unassailable exhaustion defense. See Part I.B.2, *supra*. And this exhaustion problem cannot be waived or forfeited unless the State's lawyers expressly relinquish that defense. See 28 U.S.C. 2254(b)(3). Gonzalez has no hope of obtaining habeas relief on his unexhausted speedy-trial claim, even if that claim is debatable among jurists of reason. *Slack* and *Miller-El* therefore preclude *any*

judge from issuing a COA to cure the Fifth Circuit's lack of appellate jurisdiction. See Part I.B.1, *supra*. The only thing left for this Court is to vacate the court of appeals's judgment and remand with instructions to dismiss the appeal.

II. GONZALEZ'S HABEAS APPLICATION IS TIME-BARRED UNDER 28 U.S.C. 2244(d)

If this Court concludes that the Fifth Circuit had jurisdiction over Gonzalez's appeal, then it will have authority to choose between the competing constructions of 28 U.S.C. 2244(d)(1)(A). The courts of appeals have adopted different methods for calculating the one-year limitations period when a habeas applicant failed to seek direct review in his State's highest court. Compare *Roberts* v. *Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003), with *Riddle* v. *Kemna*, 523 F.3d 850, 856 (8th Cir. 2008).

The text of section 2244(d)(1) provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

This case centers on the meaning of section 2244(d)(1)(A), which marks "the date on which the judgment became final" as a potential starting point for the one-year limitations period, and then establishes two prongs for determining when that date of finality occurs.

The Fifth Circuit holds that the "conclusion of direct review" prong applies only when the habeas applicant pursues direct review to its natural conclusion, by obtaining a judgment or a denial of certiorari from the Supreme Court of the United States. The "expiration of the time for seeking such review" prong governs all other cases—those in which the habeas applicant allows the time for seeking direct review to expire before reaching this Court. See *Roberts*, 319 F.3d at 694.

The Eighth Circuit, by contrast, applies a later-in-time rule to the two prongs of section 2244(d)(1)(A). If a state prisoner forgoes direct review in his State's highest court, the federal habeas court must determine *both* the date of "the expiration of the time for seeking [direct] review" and the date of the "conclusion of direct review," and

run the one-year clock from the later of those two dates. See *Riddle*, 523 F.3d at 856. Although it is not apparent from the statute how the "conclusion of direct review" might differ from "the expiration of the time for seeking such review" in these situations, the Eighth Circuit has equated the former prong with the date on which the intermediate state court issues its mandate. See *id.*

Gonzalez asks this Court to follow the Eighth Circuit's approach, and start his one-year clock on the date on which the intermediate state court issued its mandate. See Pet. Br. 32-50. But the Fifth Circuit's opinion in *Roberts* adopts a far superior construction of section 2244(d)(1)(A). First, the text and structure of section 2244(d)(1) favor the Fifth Circuit's interpretation over Gonzalez's. Second, Gonzalez's interpretation of section 2244(d)(1)(A) cannot be reconciled with the opinions in *Clay* v. *United States*, 537 U.S. 522 (2003), and *Jimenez* v. *Quarterman*, 129 S. Ct. 681 (2009). Third, the Fifth Circuit's approach simplifies the task for federal courts that must determine the meaning of "the conclusion of direct review."

A. The Text And Structure Of Section 2244(d)(1) Support The Fifth Circuit's Construction Of Section 2244(d)(1)(A)

Gonzalez and his amici insist that the "plain text" of section 2244(d)(1)(A) compels this Court to apply a later-in-time approach to the statute's alternate definitions of finality. Pet. Br. 32, 33, 40; NACDL Amicus Br. 3, 21. But this proposed construction of the statute finds support only in the "plain text" of Gonzalez's carefully redacted quotations of statutory

language. The actual text of section 2244(d)(1)(A) tells a different story.

Section 2244(d)(1) starts the one-year clock on "the latest of" the four "date[s]" listed in subsections (A) to (D). It does not equate the date of finality specified in subsection (A) with the *later* of the two prongs listed in that subsection. Gonzalez (once again) deploys ellipses to conceal this fact:

> As relevant here, AEDPA's one-year limitation period for the filing of habeas corpus petitions by state prisoners runs from "the latest of * * * the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

Pet. Br. 32 (omission and alteration in original). One needs only to glance at the text of section 2244(d)(1) to see that Gonzalez misleads the Court by implying that the phrase "the latest of" appears within subsection (A), when it in fact *precedes* subsection (A) and its accompanying subsections. Indeed, one does not even need to look up section 2244(d)(1) to realize that something is amiss with Gonzalez's edited quotation. Section 2244(d)(1)(A) contains only two prongs, yet Gonzalez would have us believe that the statute commands courts to apply "the *latest* of" (not "the *later* of") those *two* possible starting points. Pet. Br. 39 ("Congress has commanded that 'the latest of the two [sic] controls."). For a statute supposedly written with "silk-purse clarity," *id.* at 10, that is a surprisingly awkward and ungrammatical circumlocution. And it is a bit rich that Gonzalez would accuse the Fifth Circuit of "pretending that

Section 2244(d)(1)(A) does not mean what it says," *id.* at 33, when he so transparently quotes the statute out of context throughout his brief.

The absence of any later-in-time language *within* subsection (A) dooms Gonzalez's textual argument. Section 2244(d)(1)(A) describes "*the date* on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"—a single date to be determined either by "the conclusion of direct review" or by "the expiration of the time for seeking such review." If AEDPA's drafters wanted to define this date of finality as the *later* of those two moments, they needed only to incorporate the last-in-time language that appears earlier in section 2244(d)(1), by defining the date in subsection (A) as "the date on which the judgment became final, *determined by the later of* the conclusion of direct review or the expiration of the time for seeking such review." Or they might have broken section 2244(d)(1) into five subsections rather than four, providing that "[t]he limitation period shall run from the latest of—***(A) the date of the conclusion of direct review; (B) the date of the expiration of the time for seeking such review;***" and the three remaining subsections. Yet subsection (A) contains no indicia that its date of finality is to be determined by *the later of* the conclusion of direct review or the expiration of the time for seeking such review, and this omission becomes even more stark when section 2244(d)(1) uses explicit last-in-time language to choose among the four dates listed in subsections (A) to (D). Something other than the later-in-time rule must determine which of these two prongs controls the date of finality described in subsection (A).

The most sensible approach is the one adopted by the Fifth Circuit. In some cases direct review "concludes"; in other cases the time for seeking direct review "expires." The former category of cases includes those in which the defendant pursues his direct appeal all the way to its *natural* conclusion in the Supreme Court of the United States. In these cases finality is defined by the date of "the conclusion of direct review"—the date on which the Supreme Court of the United States denies certiorari or issues a judgment on direct appeal. The latter category includes the cases in which the defendant allows his time for seeking direct review to expire, and in these cases finality occurs on the date on which the defendant can no longer pursue direct appeals. Because Gonzalez allowed his direct appeals to "expire," without pursuing them to their "conclusion," his judgment became final at the expiration of time for seeking direct review, and his federal habeas application is therefore untimely.

On this view, the two prongs of subsection (A) do not compete with each other and force courts to resort to an arbitrary or atextual tiebreaker like the later-in-time rule. Rather, each of the prongs is designed to govern a discrete subset of cases. This approach makes subsection (A)'s failure to specify a tiebreaker between the alternate definitions of finality perfectly sensible. No tiebreaker needs to be provided in the statutory language because only one of those definitions will apply in any given case.

Gonzalez complains that this construction of subsection (A) "throws out half of the statutory text whenever review is not sought by a defendant in the State's highest court." Pet. Br. 39. But when a statute joins two clauses with the conjunction "or,"

there is nothing anomalous about one of these clauses dropping out in certain categories of cases. *Any* algorithm that chooses between subsection (A)'s two definitions of finality will cause the other prong to melt away in a defined subset of cases. Gonzalez might as well complain that his own proposal "throws out" subsection (A)'s expiration-of-time prong in all cases in which that moment predates the conclusion of direct review.

B. Gonzalez's Construction Of Section 2244(d)(1)(A) Is Irreconcilable With This Court's Decisions In *Clay* v. *United States* And *Jimenez* v. *Quarterman*

Clay v. *United States*, 537 U.S. 522 (2003), represents the federal-prisoner counterpart to this case. Clay was convicted in federal district court and appealed to the Seventh Circuit. After the federal court of appeals affirmed his conviction, Clay declined to continue his direct appeal by petitioning for certiorari. The time for seeking further direct review in this Court expired on February 22, 1999. But the Seventh Circuit issued its mandate two months earlier, on December 15, 1998. And although the statute of limitations for section 2255 motions largely tracks the provisions in section 2244(d)(1), there is one important difference: While section 2244(d)(1)(A) starts the one-year clock on "the date on which the judgment became final *by the conclusion of direct review or the expiration of the time for seeking such review*," section 2255(f)(1) defines its start date as simply "the date on which the judgment of conviction becomes final," without specifying when finality occurs.

Clay filed his section 2255 motion on February 22, 2000, exactly one year after the date on which the

time for seeking certiorari review expired. Unlike Gonzalez, Clay wanted the one-year clock to start on the date on which his time for seeking direct review expired, rather than the date on which the intermediate appellate court issued its mandate.

The Seventh Circuit rejected Clay's efforts to start the one-year clock from the date on which his time for seeking direct review expired. It held that when federal prisoners decline to petition for a writ of certiorari on direct appeal, the date of "finality" is the date on which the federal court of appeals issues its mandate. *Clay* v. *United States*, 30 F. App'x 607, 608-610 (7th Cir. 2002) (per curiam). This Court unanimously reversed, holding that "for federal criminal defendants who do not file a petition for certiorari with this Court on direct review, § 2255's one-year limitation period starts to run when the time for seeking such review expires." *Clay*, 537 U.S. at 532.

Clay poses two insurmountable obstacles to Gonzalez's proposed construction of section 2244(d)(1)(A). First, *Clay* holds that the date of "finality" under section 2255(f)(1) will *always* occur at the expiration of the time for seeking direct review if the prisoner declines to seek a writ of certiorari on direct appeal.[4] Finality will never occur on the date on which the federal appellate court issues its

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[4] See *Clay*, 537 U.S. at 527 ("Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.").

mandate on direct review, regardless of whether that date predates or postdates the expiration of time for seeking direct review. Accepting Gonzalez's argument would compel this Court to hold that section 2244(d)(1)(A)'s definition of "finality" differs from the meaning of "finality" in section 2255(f)(1). Yet *Clay* considered and rejected the notion that the differences in wording between sections 2244(d)(1)(A) and 2255(f)(1) imply any differences in meaning, see 537 U.S. at 528-531, and pointedly refused to "hold the § 2255 petitioner to a tighter time constraint than the petitioner governed by § 2244(d)(1)(A)," 537 U.S. at 529-530. Gonzalez's construction of section 2244(d)(1)(A) would do exactly that. Had Gonzalez been prosecuted in federal court, rather than state court, *Clay* would require the one-year limitations period to begin on the date of the expiration of time for seeking direct review, not the date on which the intermediate appellate court issued its mandate. Gonzalez believes he should be given more time than a similarly situated federal prisoner, solely because section 2244(d)(1)(A) defines "finality" as "the conclusion of direct review or the expiration of the time for seeking such review." But given that *Clay* explicitly rejected efforts to equate the "date of finality" with the date on which the mandate issues from an intermediate appellate court, it is impossible to read that rejected understanding of "finality" into section 2244(d)(1)(A), at least not without overruling this Court's longstanding insistence that section 2255(f)(1) tracks section 2244(d)(1)(A)'s definition of "finality." See *Clay*, 537 U.S. at 528-531.

Second, *Clay* explicitly rejects Gonzalez's efforts to incorporate state-law definitions of finality into 2244(d)(1)(A). In explaining its refusal to accord

different meanings to sections 2244(d)(1)(A) and 2255(f)(1), this Court wrote:

> [O]ne can readily comprehend why Congress might have found it appropriate to spell out the meaning of "final" in § 2244(d)(1)(A) but not in § 2255. Section 2244(d)(1) governs petitions by state prisoners. In that context, a bare reference to "became final" might have suggested that finality assessments should be made by reference to state-law rules that may differ from the general federal rule and vary from State to State. * * * *The words "by the conclusion of direct review or the expiration of the time for seeking such review" make it clear that finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule.*

Clay, 537 U.S. at 530-531 (emphasis added). Given this passage, one can only marvel at Gonzalez's insistence that state-law definitions of "finality" must determine the meaning of "the conclusion of direct review" under section 2244(d)(1)(A). See Pet. Br. 33-37. Although Gonzalez cites *Clay* and acknowledges that section 2244(d)(1)(A) provides a "uniform federal" definition of finality, he nevertheless insists that "Congress did not dictate a uniform federal answer for when either prong of its two-part finality test is met" and that "those prongs draw their core meaning from state law, and turn to federal law if and when this Court's certiorari review comes into the picture." Pet. Br. 35-36. This notion of a "uniform federal rule" that incorporates state law by reference comes close to being an oxymoron—

and it is surely not what the *Clay* opinion meant when it described section 2244(d)(1)(A) as establishing a "uniform federal rule" for finality. Indeed, *Clay* stressed that section 2244(d)(1)(A) includes a specific definition of finality in order to *avoid* a regime in which finality is determined "by reference to state-law rules that may differ from the general federal rule and vary from State to State." *Clay*, 537 U.S. at 530-531.[5]

Jimenez v. *Quarterman*, 129 S. Ct. 681 (2009), presents an even greater doctrinal obstacle for Gonzalez, as it explicitly endorses the Fifth Circuit's construction of section 2244(d)(1)(A):

> With respect to postconviction relief for federal prisoners, this Court has held that the conclusion of direct review occurs when "this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari." [*Clay*, 537 U.S. at 527, 528-532] (interpreting § 2255, ¶ 6(1)). We have further held that if the federal prisoner chooses not to seek direct review in this Court, then the conviction becomes final when "the time for filing a certiorari

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[5] Some consideration of state law is unavoidable if the habeas applicant refused to seek direct review in his State's highest court. In those cases, the "expiration of the time for seeking [direct] review" can only be measured by state-law filing deadlines, rather than the certiorari-petition deadline. Gonzalez, however, advances a broader proposition, claiming that section 2244(d)(1)(A) incorporates state-law definitions of "finality" when it describes "the conclusion of direct review." That notion cannot be reconciled with *Clay*.

> petition expires." [*Clay*, 537 U.S. at 527]. *In construing the similar language of § 2244(d)(1)(A), we see no reason to depart from this settled understanding, which comports with the most natural reading of the statutory text.*

Jimenez, 129 S. Ct. at 685 (emphasis added). The *Jimenez* Court, like the Fifth Circuit, acknowledges two (and only two) moments at which "the conclusion of direct review" might occur: the date on which this Court "affirms a conviction on the merits on direct review" or the date on which it "denies a petition for a writ of certiorari." *Ibid.* And when a prisoner forgoes direct review in the Supreme Court, the conviction becomes final when the time for seeking direct review expires—regardless of whether the last appellate court issued its mandate before or after that date.

Gonzalez ignores this passage from *Jimenez*, and claims that *Jimenez* "require[s] resort to state-law rules to determine when the 'conclusion of direct review' occurs." Pet. Br. 37-38. But *Jimenez* never even applied the conclusion-of-direct-review prong of section 2244(d)(1)(A). Because the applicant in that case never sought a writ of certiorari on direct appeal, this Court looked exclusively to the "expiration of the time for seeking [direct] review" to determine the date of finality under section 2244(d)(1)(A)—just as the Fifth Circuit did in resolving Gonzalez's habeas application. See *Jimenez*, 129 S. Ct. at 686 ("Therefore, it was not until January 6, 2004, *when time for seeking certiorari review in this Court expired*, that petitioner's conviction became 'final' through 'the

conclusion of direct review or the expiration of the time for seeking such review' under § 2244(d)(1)(A)." (emphasis added)). The date on which the last state court issued its mandate was irrelevant to the Court that decided *Jimenez*.

Fortunately, the Fifth Circuit's construction of section 2244(d)(1)(A) avoids any tension with this Court's analysis in *Clay* and *Jimenez*. That fact alone should lead this Court to reject Gonzalez's contrary interpretation of the statute.

C. The Fifth Circuit's Construction Of Section 2244(d)(1)(A) Simplifies The Task For Courts That Must Determine "The Conclusion Of Direct Review"

The Fifth Circuit's approach in *Roberts* holds yet another advantage over Gonzalez's proposed later-in-time rule: ease of application. By sorting the cases in which the time for seeking direct review "expires" from those in which direct review "concludes," the Fifth Circuit provides a straightforward method for determining "the conclusion of direct review." It will occur on the date that the Supreme Court of the United States denies certiorari or affirms the criminal defendant's conviction. See, *e.g.*, *Clay*, 537 U.S. at 527 ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.").

Under Gonzalez's approach, by contrast, courts will have to determine "the conclusion of direct review" in *every* case, including the cases in which the habeas applicant allowed the time for seeking direct review to expire. Neither the statute nor this Court's precedent provides any guidance for determining "the conclusion of direct review" in these

situations. Gonzalez tacitly acknowledges this by arguing that courts should allow state law to define "the conclusion of direct review" in this subset of cases. Pet. Br. 33-46. But there are several problems with that proposal.

The first problem is that section 2244(d)(1)(A) makes no mention of state law, and contains no language purporting to incorporate state-law notions of finality. It would have been easy enough for AEDPA's drafters to incorporate these state-law standards into section 2244(d)(1)(A); they could have started the one-year clock on "the date on which the judgment became final by the conclusion of direct review *under state law* or the expiration of the time for seeking such review." But they did not do so, and this failure to mention state law contrasts with other provisions in the federal habeas statute that explicitly incorporate state-law standards. See, *e.g.*, 28 U.S.C. 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, *if he has the right under the law of the State* to raise, by any available procedure, the question presented." (emphasis added)). We are at a loss to understand Gonzalez's ringing assertion that "[t]he plain textual meaning [of section 2244(d)(1)(A)] incorporates state law." Pet. Br. 33.

The second problem is that state law does *not* determine "the conclusion of direct review" when a criminal defendant pursues his direct appeals to the Supreme Court of the United States. If a defendant petitions for a writ of certiorari on direct review, then the expiration-of-time prong in section 2244(d)(1)(A) is inapplicable, and the date of finality must be determined solely by "the conclusion of

direct review." But in these cases, the meaning of "the conclusion of direct review" rests squarely on the precedents of this Court, which provide a uniform, federal-law definition: the date on which this Court denies certiorari or affirms the conviction on direct appeal. See *Clay*, 537 U.S. at 527 (collecting authorities); *Jimenez*, 129 S. Ct. at 685. As Gonzalez does not ask this Court to overrule the decisions applying this federal-law definition of "the conclusion of direct review," we must conclude that Gonzalez is advancing a more limited proposition: That the federal-law precedents of this Court should define "the conclusion of direct review" when a criminal defendant pursues his direct appeals to this Court, but that state law should define "the conclusion of direct review" in all other cases.

The third problem is that Gonzalez would require federal habeas courts to determine how state law defines "the conclusion of direct review." That is an unenviable task, as state-law systems adopt many different definitions of "finality," and state-law understandings of "finality" may not always equate with "the conclusion of direct review." See, *e.g.*, *Clay*, 537 U.S. at 527 ("Finality is variously defined; like many legal terms, its precise meaning depends on context."). Gonzalez acknowledges that only 27 States have equated the "conclusion of direct review" with the issuance of a state court's mandate; the other States either have adopted different understandings of finality or else have not provided clear guidance. Pet. Br. 47. A state supreme court's precedent will not always be clear on when "direct review" concludes in particular situations, which could lead federal habeas courts to certify state-law

questions, further delaying the federal postconviction review process.[6]

The Fifth Circuit's approach simplifies the statute-of-limitations inquiry: If the habeas applicant allowed his time for seeking direct review to expire, then start the one-year clock on the expiration date. Otherwise, start the one-year clock at "the conclusion of direct review," defined as the date on which the Supreme Court of the United States either denied certiorari or affirmed the conviction. There is no need to traipse through state-court opinions or divine how a state supreme court might determine the "conclusion of direct review" in any particular case. And there is little point in saddling the federal habeas courts with these added responsibilities when section 2244(d)(1)(A) makes no mention or allusion to state-law standards of finality, and when this Court has declared that "finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a *uniform federal rule*" rather than "state-law rules that may differ from the general federal rule and vary from State to State." *Clay*, 537 U.S. at 530-531 (emphasis added).

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[6] Gonzalez insists that the issuance of the mandate determines finality under Texas law, Pet. Br. 33, but that is far from clear. The Texas Supreme Court and the CCA are apparently divided over whether the mandate determines finality under Texas Rule of Appellate Procedure 18.1. Compare *Ex parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000) ("Prior to the mandate, a judgment is not final."), with *Edwards Aquifer Auth.* v. *Chem. Lime, Ltd.*, 291 S.W.3d 392, 411 (Tex. 2009) (Brister, J., concurring) ("[M]andates issue 10 days *after* our judgment is final * * *. * * * The problem is that it is hard to say when our decisions are final.").

In the alternative, Gonzalez asks this Court to equate the "conclusion of direct review," as a matter of federal law, with the date on which the state appellate court issues its mandate. Pet. Br. 47-50. (Presumably this proposed definition would apply only in the cases where the defendant declined to seek further review in the state supreme court or in the Supreme Court of the United States.) Although this date would be easier for courts to determine than the date of "finality" under state law, the proposal still rests on Gonzalez's dubious later-in-time (or "latest"-in-time?) construction of section 2244(d)(1)(A)—an interpretation that finds no support in the statutory language or structure and that cannot be squared with this Court's opinions in *Clay* or *Jimenez*.[7] Neither of Gonzalez's proposed constructions of the "conclusion of direct review" can overcome those statutory and doctrinal obstacles to extending that phrase beyond the cases in which the criminal defendant pursued his direct appeals to conclusion in this Court.

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[7] *Lawrence* v. *Florida*, 549 U.S. 327 (2007), is no help to Gonzalez. That case involved the period of statutory tolling under 28 U.S.C. 2244(d)(2), not the definition of finality in 28 U.S.C. 2244(d)(1)(A). And the parties in *Lawrence* had *stipulated* that the issuance of the state supreme court's mandate marked the end of the statutory tolling period, so this Court had no occasion to rule on the significance of the issuance of the mandate. 549 U.S. at 331 ("[T]he parties agree that AEDPA's limitations period was tolled from the filing of Lawrence's petition for state postconviction relief until the Florida Supreme Court issued its mandate affirming the denial of that petition.").

D. Gonzalez Does Not Enjoy The Benefit Of The 90-Day Period For Filing A Certiorari Petition

Gonzalez's last-ditch argument is that the Fifth Circuit erred by equating the "expiration of the time for seeking direct review" with August 11, 2006—the last day on which Gonzalez could have petitioned the CCA for discretionary review of his judgment on direct appeal. Gonzalez thinks he should get an extra 90 days, because he claims that he might have petitioned this Court for a writ of certiorari even after spurning his opportunity to continue his direct appeal in the State's highest criminal court.

This Court would lack jurisdiction to review the intermediate state court's judgment on Gonzalez's hypothetical certiorari petition. Under 28 U.S.C. 1257(a), this Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Gonzalez did not petition the CCA, Texas's highest court in criminal cases, for discretionary review after the intermediate state court affirmed his conviction. Therefore, the intermediate state court's judgment cannot qualify as a "[f]inal judgment[] * * * rendered by the highest court of a State in which a decision could be had," and this Court lacks jurisdiction to review it. See, *e.g.*, *Costarelli* v. *Massachusetts*, 421 U.S. 193, 195-197 (1975) (per curiam); *Banks* v. *California*, 395 U.S. 708, 708 (1969) (per curiam).

Gonzalez does not even attempt to argue that section 1257(a) would have allowed him to petition for certiorari after forgoing direct review in the CCA. Instead, he notes that section 1257(a) allows *other* litigants to petition for certiorari from judgments of intermediate state courts, and claims that it would be too much work for federal habeas courts to

determine whether a hypothetical certiorari petition would have fallen within the jurisdictional grant of section 1257(a). Pet. Br. 54. Therefore, according to Gonzalez, courts should give *every* criminal defendant who declines to petition for a writ of certiorari an extra 90 days of direct-review time—including those, like Gonzalez, who were clearly ineligible to file a certiorari petition in this Court.

This proposal cannot be reconciled with the text of section 2244(d)(1)(A). The "time for seeking [direct] review" does not continue when a litigant is patently ineligible to "seek[]" a writ of certiorari from this Court or pursue direct appeals in any other court. And when a convicted federal prisoner fails to take a direct appeal to the court of appeals, his judgment becomes "final" under section 2255(f)(1) when the 10-day window for filing a notice of appeal closes; he does not get an extra 90 days if he throws in the towel after the adverse district-court ruling. See, *e.g.*, *United States* v. *Plascencia*, 537 F.3d 385, 388 & n.11 (5th Cir. 2008) (collecting Second, Third, and Sixth Circuit authorities); *Anjulo-Lopez* v. *United States*, 541 F.3d 814, 816 n.2 (8th Cir. 2008); *United States* v. *Prows*, 448 F.3d 1223, 1227-1228 (10th Cir. 2006). Gonzalez is correct to note that *Snook* v. *Wood*, 89 F.3d 605, 612 (9th Cir. 1996), asserts (without any analysis) that finality for *Teague* purposes occurs 90 days after an intermediate state court terminates direct review, even though the defendant in that case voluntarily withdrew his appeal and never sought further review in the state supreme court. We respectfully ask this Court to disapprove that part of the Ninth Circuit's opinion.

CONCLUSION

The judgment of the court of appeals should be vacated and the cause remanded with instructions to dismiss the appeal for lack of jurisdiction. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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RAFAEL ARRIAZA GONZALEZ,

Petitioner,

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

REPLY BRIEF FOR THE PETITIONER 1

I. THE COURT HAD JURISDICTION TO ISSUE THE CERTIFICATE OF APPEALABILITY AND TO ADJUDICATE THE APPEAL 2

A. Jurisdiction To Issue The Certificate of Appealability 2

B. Jurisdiction To Adjudicate The Appeal 6

C. This Court Has Jurisdiction To Resolve The Case 13

II. PETITIONER'S SECTION 2254 PETITION WAS TIMELY FILED 13

A. Text And Precedent Reference State Law To Determine When The "Finality" Test Is Met 14

B. Unlinking Finality From State Law Would Put Section 2244's Finality Rule And Its Limitations Period At Cross Purposes 21

C. The Expiration of Time For Petitioner To Seek Direct Review Includes The Certiorari Timeframe 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 6

Baldwin v. Reese,
541 U.S. 27 (2004) 4, 5

Becker v. Montgomery,
532 U.S. 757 (2001) 12

Bledsue v. Johnson,
188 F.3d 250 (5th Cir. 1999) 4

Carey v. Saffold,
536 U.S. 214 (2002) 15, 23

Carty v. Thaler,
583 F.3d 244 (5th Cir. 2009) 4

Clay v. United States,
537 U.S. 522 (2003) 16, 20, 21

Clingman v. Beaver,
544 U.S. 581 (2005) 3

Coleman v. Thompson, 501 U.S. 722 (1991) 22

D'Ambrosio v. Bagley,
527 F.3d 489 (6th Cir. 2008) 4

Day v. McDonough,
547 U.S. 198 (2006) 3

Dolan v. United States,
130 S. Ct. 2533 (2010) 8

Dorsey v. Chapman,
262 F.3d 1181 (11th Cir. 2001) 4

Ex parte McKenzie,
491 S.W.2d 122 (Tex. Crim. App. 1973) 5

Ex parte Torres,
943 S.W.2d 469 (Tex. Crim. App. 1997) 5

Fay v Noia,
372 U.S. 391 (1963), *overruled on other grounds*, *Coleman v. Thompson*, 501 U.S. 722 (1991) 22

FCC v. AT&T Inc.,
131 S. Ct. 1177 (2011) 11

Foman v. Davis,
371 U.S. 178 (1962) 11

Granite Rock Co. v. International Bhd. of Teamsters,
130 S. Ct. 2847 (2010) 4

Henderson ex rel. Henderson v. Shinseki,
131 S. Ct. 1197 (2011) 6, 9

Hernandez v. Thaler,
630 F.3d 420 (5th Cir. 2011) 5

Holland v. Florida,
130 S. Ct. 2549 (2010) 2

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 12

Jimenez v. Quarterman,
555 U.S. 113 (2009) ..... *passim*

Kerns v. Ault,
408 F.3d 447 (8th Cir. 2005) 4

Kontrick v. Ryan,
540 U.S. 443 (2004) 3, 11

Lapides v. Board of Regents of the Univ. Sys.,
535 U.S. 613 (2002) 12

Lawrence v. Florida,
549 U.S. 327 (2007) 15

Losh v. Fabian,
592 F.3d 820 (8th Cir. 2010) 21

Medellin v. Dretke,
544 U.S. 660 (2005) 12, 13

Miller-El v. Cockrell,
537 U.S. 322 (2003) 5, 6

National Archives & Records Admin. v. Favish,
541 U.S. 157 (2004) 7

Northwest Airlines, Inc. v. County of Kent,
510 U.S. 355 (1994) 4

O'Sullivan v. Boerckel,
526 U.S. 838 (1999) 5, 22

Pace v. DiGuglielmo,
544 U.S. 408 (2005) 15

Pike v. Guarino,
492 F.3d 61 (1st Cir. 2007) 4

Reed Elsevier, Inc. v. Muchnick,
130 S. Ct. 1237 (2010) 11

Reiter v. Cooper,
507 U.S. 258 (1993) 23

Rhines v. Weber,
544 U.S. 269 (2005) 3

Rose v. Lundy,
455 U.S. 509 (1982) 22

Russello v. United States,
464 U.S. 16 (1983) 10

Sharrieff v. Cathel,
574 F.3d 225 (3d Cir. 2009) 4

Slack v. McDaniel,
529 U.S. 473 (2000) 13

Stern v. Marshall,
131 S. Ct. 2594 (2011) 3

Teague v. Lane,
489 U.S. 288 (1989) 21

Torres v. Oakland Scavenger Co.,
487 U.S. 312 (1988) 11, 12

Wheeler v. Jones,
266 F.3d 656 (6th Cir. 2000) 21

CONSTITUTION AND STATUTES

U.S. Const., Eleventh Amendment 12

28 U.S.C.
§ 157(b)(1) 3
§ 157(b)(2) 3
§ 157(b)(5) 3
§ 2101(c) 20
§ 2244(d) 15, 21, 23
§ 2244(d)(1) ..... *passim*
§ 2244(d)(1)(A) ..... *passim*
§ 2244(d)(2) 14, 15, 21, 23
§ 2253(a) 3
§ 2253(b) 3
§ 2253(c) 3, 6, 12
§ 2253(c)(1) 10
§ 2253(c)(2) 2, 3
§ 2253(c)(3) 10
§ 2254(b)(3) 4

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, Title I, 110 Stat. 1217 ..... *passim*

RULES

Fed. R. App. P. 3 ..... 11, 12

Fed. R. App. P. 40 20

Fed. R. App. P. 41 20

S. CT. R. 15.2 4

OTHER AUTHORITIES

Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Tables 5.70.2006, 5.44.2006, available at http://www.albany.edu/sourcebook/tost_5.html 16

In The
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No. 10-895

RAFAEL ARRIAZA GONZALEZ,

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v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent and its amicus offer this Court a stark vision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, Title I, 110 Stat. 1217, as a blunderbuss designed to lock shut the federal courthouse doors and to deny state prisoners access to the Great Writ heedless of the substantiality of the constitutional claims presented or the procedural care with which they were preserved. First, respondent and the Solicitor General insist that the certificate of appealability requirement converts federal habeas into a game of

chance, in which a petitioner's one and only opportunity for review of a substantial and properly raised constitutional claim can evaporate if, by sheer bad luck, the authorizing judge miswrites the certificate. That is not the balanced preservation of "basic habeas corpus principles." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010).

Second, with respect to determining the finality of state convictions, respondent would put Section 2244(d)'s provisions at cross purposes, reading AEDPA as so woodenly dismissive of state law that it would render many state defendants' convictions final—starting the federal habeas clock running—*before* state law would permit the commencement of state postconviction review. It thus is unsurprising that respondent stands alone, without the support of a single State as amicus, in advancing this crabbed and state-law-hostile reading of statutory text.

I. THE COURT HAD JURISDICTION TO ISSUE THE CERTIFICATE OF APPEALABILITY AND TO ADJUDICATE THE APPEAL

A. Jurisdiction To Issue The Certificate Of Appealability

1. Respondent concedes (Br. 26, 35) and the Solicitor General does not dispute that the court of appeals had jurisdiction to issue petitioner's certificate of appealability. Additionally, neither respondent nor the Solicitor General disputes that petitioner satisfied Section 2253(c)(2)'s requirement of "ma[king] a substantial showing of the denial of [his] constitutional right" to a speedy trial based on the decade-long lapse of time between indictment and trial caused by the conscious choice of State

investigators and prosecutors not to follow up on known information. Accordingly, this Court need not decide whether noncompliance with Section 2253(c)(2) is jurisdictional (although it is not, *see* Pet. Br. 21-25).[1]

2. Notwithstanding his express concession that jurisdiction attached, respondent spills substantial ink arguing that petitioner failed to exhaust his speedy trial claim. That argument is both procedurally barred and substantively wrong.

First, exhaustion under AEDPA is not jurisdictional. *See Day v. McDonough*, 547 U.S. 198, 205-206 (2006); *Rhines v. Weber*, 544 U.S. 269, 277-279 (2005). Accordingly, because the exhaustion issue was "neither raised nor decided below," and is not encompassed within the questions presented, it is not before this Court. *Clingman v. Beaver*, 544 U.S. 581, 598 (2005).

Second, respondent not only failed to raise this objection in its brief in opposition, it actually argued the opposite. Respondent advised the Court that the petition applied "only" to prisoners who do not seek review in their State's highest court and yet "preserved an *exhausted* claim for a federal habeas

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[1] The Solicitor General errs in arguing (Br. 18-22) that all of Section 2253(c) must be jurisdictional because it follows putatively jurisdictional provisions in Sections 2253(a) and 2253(b). *Stern v. Marshall*, 131 S. Ct. 2594 (2011), held that 28 U.S.C. § 157(b)(5) is not jurisdictional despite the fact that its neighboring provisions (Sections 157(b)(1) and (b)(2)) are jurisdictional, 131 S. Ct. at 2606-2607; *see Kontrick v. Ryan*, 540 U.S. 443, 453 (2004) (Sections 157(b)(1) and 157(b)(2) are jurisdictional).

court to review." Opp. 10 (emphasis added); *see id.* at 2 ("Gonzalez exhausted his state post-conviction remedies."). Those express assurances waived the exhaustion claim both generally, *see* 28 U.S.C. § 2254(b)(3), and specifically for the proceedings before this Court, because any non-jurisdictional "objection to [this Court's] consideration of [the] question[s] presented" must be raised in the brief in opposition, S. Ct. R. 15.2. *See also Granite Rock Co. v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2861 (2010) (argument abandoned on appeal and omitted from brief in opposition waived); *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (nonjurisdictional argument first raised in merits brief is waived).[2]

Third, because respondent's exhaustion argument attacks the certificate of appealability, and thus (in respondent's view) the court of appeals' jurisdiction, the argument seeks to alter the judgment below from an affirmance to a dismissal for lack of jurisdiction. Arguments aimed at altering a judgment must be made by petition or cross-petition. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994).

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[2] Every court of appeals to have addressed the question has held that such representations satisfy Section 2254(b)(3)'s express-waiver provision. *See, e.g., Carty v. Thaler*, 583 F.3d 244, 256-257 (5th Cir. 2009) (concession that claims "appear[ed]" to be exhausted); *Sharrieff v. Cathel*, 574 F.3d 225, 228-229 (3d Cir. 2009); *Pike v. Guarino*, 492 F.3d 61, 71-72 (1st Cir. 2007); *Kerns v. Ault*, 408 F.3d 447, 449 n.3 (8th Cir. 2005); *Dorsey v. Chapman*, 262 F.3d 1181, 1186-1187 (11th Cir. 2001); *Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999); *see also D'Ambrosio v. Bagley*, 527 F.3d 489, 495-496 (6th Cir. 2008).

Fourth, and in any event, the exhaustion argument is wrong. Petitioner "fairly presented" his speedy trial claim to the Texas Court of Criminal Appeals, *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999), and "alert[ed] it to the presence of" that claim, *Baldwin*, 541 U.S. at 32, by plainly stating in his brief that he "was denied his Constitutional Right to a Speedy Trial" and incorporating the speedy trial arguments he made before the intermediate appellate court. J.A. 88; *see Baldwin*, 541 U.S. at 32 (habeas petitioner can present claim by "indicat[ing]" it "in a state-court petition or brief").

Respondent objects (Br. 33) to imprecision in a heading in Gonzalez's brief. But "[i]t is the substance of the relief sought by a *pro se* pleading, not the label that the petitioner has attached to it, that determines the true nature and operative effect of a habeas filing." *Hernandez v. Thaler*, 630 F.3d 420, 426-427 (5th Cir. 2011). Likewise, while respondent is correct (Br. 33-34) that, in Texas, habeas review "generally" does not extend to claims raised on direct review, *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997), that rule is not inflexible, *Ex parte McKenzie*, 491 S.W.2d 122, 124 (Tex. Crim. App. 1973) (granting habeas relief on a speedy trial claim that had been litigated on direct review).

Finally, respondent cannot turn exhaustion into a jurisdictional constraint by interlarding it with the certificate-of-appealability determination. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court rejected Texas's previous effort to read the State's merits defenses into the certificate determination, holding that the petitioner "need *only* demonstrate 'a substantial showing of the denial of a constitutional

right,'" *id.* at 327 (emphasis added). Accordingly, a court "should limit its examination to a threshold inquiry into the underlying merit of [the] claims," *id.*, "in the habeas petition" itself, *id.* at 336. After that, AEDPA "forbids," *id.* at 336, as "fundamental" error the more open-ended inquiry into the State's defenses that Texas unsuccessfully sought in *Miller-El* and seeks again here, *id.* at 342.

B. Jurisdiction To Adjudicate The Appeal

Although respondent ignores it, this Court's law is clear that a statutory restriction will be deemed jurisdictional only if Congress "clearly states" that it is. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). Subsection (c)(3) contains no such clear statement. Nothing in its text employs "jurisdictional terms" or references the court's "adjudicatory capacity." *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202, 1204 (2011). Instead, the court's duty to "indicate" the constitutional issue meriting appeal is a case-processing requirement designed to *document* the substantive gatekeeping determination of merit that is already reflected in the court's issuance of the certificate.

Underscoring the case-processing, non-jurisdictional character of the indication requirement is the absence of any congressional suggestion—let alone "clear[]" direction—that the purpose of subsection (c)(3) is to withhold the Great Writ from state prisoners with meritorious and procedurally proper habeas petitions *solely* because the prisoner had the bad luck of having his hard-earned certificate miswritten by the court. After all, Section 2253(c) is meant to perform a sensible gatekeeping, not an arbitrary door-slamming, function.

The Solicitor General argues (Br. 27) that those severe jurisdictional consequences must be visited upon prisoners who are helpless to control the content of court orders because it will "give[] courts" an "added incentive to pay close attention" to the statutory requirements. That argument is wrong for five reasons.

First, the argument begs the question of what inference should be drawn from the error in the certificate's writing. For a century, judges and circuit justices knew that it was the act of issuing a certificate that designated the case as having potential merit. *See* SG Br. 2-3. Still now, the issuance of a certificate documents that a federal judge or justice, cognizant of the gatekeeping function, has (i) devoted time to studying an application, (ii) determined that a substantial showing of the denial of a constitutional right was made, and (iii) made the judicial judgment to issue an order of jurisdictional consequence obligating his or her court to commit resources to adjudicating the prisoner's claim on the merits.

Given all that, the proper presumption to draw when a certificate omits indication of a substantial constitutional issue is *not* that federal judges or circuit justices are flouting the law, inflicting "frivolous" appeals on their own courts, or not "pay[ing] close attention" to execution of their judicial function (SG Br. 27). Rather, the better approach, consonant with inter-Branch comity, would be to accord the Judicial Branch the same "presumption of legitimacy" that the Solicitor General is always quick to claim for Executive Branch actions, *National Archives & Records Admin. v. Favish*, 541 U.S. 157,

174 (2004), and to assume that the failure to indicate the issue in the certificate's text was an oversight. If the government thinks otherwise, it can seek review of the certificate. But a presumption of judicial overreaching should not be the starting point.

Second, absolutely nothing in AEDPA's text or purpose supports judicial imposition of a "coercive sanction" on the habeas petitioner who "bear[s] no responsibility" at all for the court's omission. *Dolan v. United States*, 130 S. Ct. 2533, 2539, 2540 (2010). Because no one disputes that the Fifth Circuit judge (i) issued a certificate of appealability in good faith, (ii) was fully aware of his legal obligations in doing so, or (iii) reasonably concluded that petitioner had shown both a substantial constitutional and procedural claim, then summarily dismissing petitioner's one and only opportunity for federal review of his substantial federal constitutional claim would not serve any legitimate gatekeeping function.

Third, the Solicitor General supposes (Br. 27) that making the indication requirement "jurisdictional" will encourage the parties to challenge certificates of appealability "at the outset, in order to avoid the possible dismissal of an appeal later." But, of course, concern about "the possible dismissal of an appeal later" is not evenly shared between the State and the prisoner-appellant. In fact, making the requirement jurisdictional would be counterproductive because it would create a perverse incentive for the State *not* to call such missteps to the court's attention. Specifically, standing silent puts the State in a win-win situation: it can either prevail on the merits or, if it loses, the State can have the

adverse judgment vacated later for jurisdictional reasons.

That is not to say, of course, that State officials would deliberately engage in such gamesmanship. Indeed, petitioner's reading presumes that State officials do not need an "incentive" to fulfill their duties as officers of the court to alert the court to procedural oversights. The argument simply echoes this Court's recognition that there are "drastic" consequences to attaching jurisdictional status to statutory requirements, including the risk of such after-the-fact upending of "months of work" by the court and "unfair[] prejudice" to litigants. *Henderson*, 131 S. Ct. at 1202.

In short, if the goal is to increase incentives for litigants to backstop the court's compliance, then preserving subsection (c)(3)'s non-jurisdictional character structurally ensures that the party best equipped to reinforce the courts' work—the State, with its AEDPA-trained lawyers rather than the *pro se* prisoner—has every incentive early on to call the oversight to the court's attention. And if respondent is confused about what issue to brief in the wake of a deficient certificate (Resp. Br. 16), the answer is to alert the court to the oversight and obtain the desired clarification.[3]

Fourth, the statutory text disproves respondent's and the Solicitor General's jurisdictional reading.

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[3] Respondent's assurance (Br. 10) that an appeals court will not dismiss a habeas appeal "because some circuit judge goofed by failing to indicate a constitutional claim" rings hollow given that respondent seeks precisely such a dismissal.

Respondent's central argument (Br. 9-26) is that a certificate that omits an indication of the constitutional issue is no certificate at all. That entire argument, however, assumes rather than proves the answer to the question presented. It also ignores that, for 90 years, certificates were awarded and fully effective without any such statutory indication requirement.

The argument is also atextual. If issue-indication were an indispensable precondition, then Congress would have mirrored subsection 2253(c)(1)'s verb choice and said that a certificate "**shall** not issue" unless it lists the substantial constitutional questions. Indeed, even subsection (c)(2)'s softer "may issue" language shows that Congress knows how to link a requirement to the jurisdictional aspect of the certificate's issuance when it wishes to do so. Congress's omission of similar conditional language in subsection (c)(3), and in particular, its verb shift from "issue" to "indicate," must be given effect. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").[4]

Both respondent and the Solicitor General argue that Section 2253(c)(3)'s use of the word "indicate" is

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[4] The language of subsection (c)(2), taken in context, is not jurisdictional either. *See* Pet. Br. 21-23. But it is at least textually closer to the conditional language that respondent wishes to write into subsection (c)(3).

directive because it is paired with the word "specify." S.G. Br. 17-18; Resp. Br. 15-16. No it is not. The word "specify" appears nowhere in subsection (c)(3). "[S]pecific" does. But, as the Solicitor General argued just last Term, it is a mistake—and certainly not "clear" congressional direction—to attempt to equate the adjectival form of a word with its noun or (here) verb form. *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1181-1182 (2011).

Respondent also contends that subsection (c)(3) is jurisdictional because it operates upon a document, not a person. That distinction does not work either. *See generally Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010) (subject of provision deemed nonjurisdictional is a "civil action"); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (subject is "a complaint").

Likewise, respondent's analogy to notices of appeal overlooks that the rule of unyielding compliance that he seeks has been eschewed under Federal Rule of Appellate Procedure 3. That Rule's textual mandate concerning a notice of appeal's content is much more emphatic than (c)(3), and nevertheless it can be satisfied by the information's "functional equivalent." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-317 (1988).

Petitioner's point is the same: the formal judicial judgment embodied in the issuance of a certificate of appealability combined with the applicant's showing of a substantial constitutional claim together can serve as the functional equivalent of (c)(3)'s indication requirement. *See Foman v. Davis*, 371 U.S. 178, 181 (1962) (notice of appeal sufficient as to unenumerated court order despite Rule 3's requirement to list all orders from which an

appeal is taken); *Torres*, 487 U.S. at 317 (Rule 3 may be satisfied by a notice of appeal disclosing information "functional[ly] equivalent" to the Rule's requirements); *see also Becker v. Montgomery*, 532 U.S. 757, 767 (2001) ("imperfections in noticing an appeal should not be fatal where no genuine doubt exists about" the relevant information).

Finally, and in any event, as the Solicitor General notes (Br. 24 n.4), labeling elements of Section 2253(c) "jurisdictional" would not answer the separate question of whether Congress intended such a jurisdictional constraint to strip the court of subject matter jurisdiction, or whether instead it functions as a type of jurisdictional limitation—like personal jurisdiction or Eleventh Amendment immunity—that is subject to waiver if not timely raised by the party it protects. *See Medellin v. Dretke*, 544 U.S. 660, 678-679 (2005) (O'Connor, J., dissenting); *see generally Lapides v. Board of Regents of the Univ. Sys.*, 535 U.S. 613 (2002) (voluntary appearance in federal court waives Eleventh Amendment immunity); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-704 (1982) (personal jurisdiction can be waived).

The latter approach is more consonant with the certificate's gatekeeping and resource-preservation function. Those functions protect States and the courts from the unnecessary expenditure of resources on insubstantial appeals, goals that are confounded by unraveling the court's consented-to work months or years after the fact. Thus the "[p]redicate considerations for a COA * * * are not the sorts of considerations that remain open for review

throughout the entire case." *Medellin*, 544 U.S. at 679.

C. This Court Has Jurisdiction To Resolve The Case

Even if the Fifth Circuit's oversight had jurisdictional consequence, this Court can either issue a certificate of appealability itself so that it can resolve the procedural question on which the lower courts have divided (*see* Pet. Br. 30), or the Court can proceed as it did in *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Jimenez v. Quarterman*, 555 U.S. 113 (2009), because the certification requirement does not apply to this Court. To be sure, in this case any lack of jurisdiction would be attributable to the court of appeals' oversight, not intentional relinquishment. But that is a distinction of no jurisdictional difference. Either way, this Court is now reviewing the validity of the certification decision just as it did in *Slack* and *Jimenez*. *Why* the certification decision was erroneous should not change this Court's power to act. "Congress expressed no" more of an "intention to allow" appellate court than "trial court procedural error to bar vindication of substantial constitutional rights on appeal" in habeas cases. *Slack*, 529 U.S. at 483.

II. PETITIONER'S SECTION 2254 PETITION WAS TIMELY FILED

In its fifty-three pages of argument, respondent never addresses, let alone answers, the most fundamental flaw in the court of appeals' holding: insistence on a single, wooden rule of finality creates in many cases an unbridgeable gap between the finality of a state conviction and the ripeness of a

state habeas (or even federal habeas) application. Federal laws should not be construed to work against themselves that way. Yet, under respondent's view, Section 2244(d)(1)(A) starts the clock running on its one-year statute of limitations at a time when, under Section 2244(d)(2), the prisoner can neither bring suit nor toll the time from running because state law does not yet consider the conviction final. Likewise, laws expressly designed to promote federalism should not be interpreted to discard the States' design of their own state review systems in favor of superimposing a procrustean federal rule ungrounded in statutory text, precedent, or purpose.

A. Text And Precedent Reference State Law To Determine When The "Finality" Test Is Met

1. The parties do not dispute that Congress prescribed a uniform federal test of finality measured by (i) "the conclusion of direct review," or (ii) "the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The fundamental dispute instead is over whether state law has *any* role in determining when a State's own "direct review" process "conclu[des]," or when "the time for seeking such review" "expir[es]." *Id.*

Respondent insists (Br. 47-55) that state law has no role to play in determining when state direct review concludes. But that sure would be odd. If Congress wanted to wall state law out of the picture, it would not have made the state process, as prescribed by state law, the focal point of its statutory test. "Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions."

Carey v. Saffold, 536 U.S. 214, 223 (2002). And it is telling that, in the immediately neighboring subsection, AEDPA's tolling rule, 28 U.S.C. § 2244(d)(2), looks to state law to determine when state postconviction and collateral review end, *see Lawrence v. Florida*, 549 U.S. 327, 331-333 (2007), and whether the petition was properly filed, *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

Still worse, after insisting for pages that state law has nothing to do with Section 2244(d)(1)(A)'s test, respondent footnotes his admission that, actually, state law exclusively defines when the "expiration of the time for seeking [direct] review" occurs in the second clause of Section 2244(d)(1)(A). Resp. Br. 49 n.5 (expiration clause "can only be measured by state-law filing deadlines").

So, at bottom, respondent asks this Court to hold that Section 2244(d)'s federally prescribed tests consistently look to state law to define when state postconviction review ends, when collateral review ends, when the period of time for seeking review ends, and when a state habeas petition is properly filed, but they then suddenly and anomalously casts state law aside in deciding when state direct review ends. Nothing in the statutory text or structure supports making the direct-review clause such a state-law-spurning outlier.

Similarly, respondent's backhanded argument that referencing state law to determine when a federal standard is met is "oxymoron[ic]" (Br. 48) simply ignores that state law performs precisely that function most everywhere else in Section 2244(d).

To be sure, as respondent explains (Br. 46-50), Congress also intended for Section 2244(d)(1)(A) to

include the time for seeking certiorari review in this Court and disposition of a petition. *See Clay v. United States*, 537 U.S. 522, 527 (2003). But the inclusion of certiorari review at the end no more displaces the role of state law in the direct-review clause than it does in the expiration-of-time clause.

Beyond that, respondent's suggestion (Br. 40) that *only* this Court's discretionary review of a state conviction can serve as the "natural conclusion" of direct review ignores both text and practical reality. To begin with, if the definition were meant to be so certiorari-centric, then Congress would have said the "conclusion of *Supreme Court* review." Because very few direct appeals from state prisoners actually reach this Court, however, Congress employed more elastic phraseology that provides an ending date encompassing both certiorari review and all those cases like petitioner's that stop short of the certiorari process.[5]

2. Respondent's position depends critically on reading the direct-review and expiration-of-time clauses as mutually exclusive, with defendants falling into one category or the other, but never both. That is why he argues (Br. 43) that Section 2244(d)(1)'s "latest of" constraint has no application

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[5] Only a tiny percentage of state criminal defendants seek direct review in this Court. In 2006, the States obtained 1,132,290 felony convictions. Over that same period, only 3,437 certiorari petitions were filed from all convictions (state and federal, felony and non-felony). Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Tables 5.70.2006, 5.44.2006, available at http://www.albany.edu/sourcebook/tost_5.html.

to the different prongs of (d)(1)(A), leaving him free to argue that petitioner's conviction became final at the earliest possible date.

Jimenez, however, proves the opposite. There, the district court held (consistent with respondent's position) that Jimenez's conviction became final under the expiration-of-time clause when Jimenez did not seek discretionary review of the intermediate appellate court's decision in the Texas Court of Criminal Appeals. *See* 555 U.S. at 117. This Court nevertheless ruled that a *later* date determined the finality of Jimenez's conviction because state law re-opened the "'direct review'" process and rendered the conviction "no longer final." *Id.* at 119, 120.

Thus, the expiration of time to appeal does not mean that further direct review could not occur, and the two categories are not mutually exclusive. As a result, respondent is left advancing a reading of statutory language that ignores fully half of the relevant text for all cases that stop short of a State's highest court. Moreover, Congress presumably recognized that, for state prisoners, direct review not infrequently ceases without any invocation of this Court's certiorari process. *See* n.5, *supra*. Petitioner's reading thus gives the "conclusion of direct review" meaning in the vast majority of real-world cases. Respondent, by contrast, would construe the statute to mean, in that recurring context, that state direct review never concludes. It just evaporates.

Respondent also makes a lengthy grammatical objection (Br. 42-44) to petitioner's reliance on Section 2244(d)(1)'s direction that the "latest of" the possible finality dates governs. Petitioner, however,

does not dispute that Section 2244(d)(1)(A) will contribute a single date of finality for the conviction. But *Jimenez* makes clear that sometimes, in that process, the two prongs of (d)(1)(A) produce different dates. And when that happens, the "latest of" command equally applies within Section 2244(d)(1)(A). Respondent certainly offers no basis, textual or otherwise, for concluding that Congress intended for the *earlier* of the two dates to govern.[6]

3. Precedent does not sustain respondent's reading of Section 2244(d)(1)(A) either. *Jimenez* confirms that, while AEDPA prescribes a "uniform federal date of finality," state law "pinpoints" the date when that test is satisfied by identifying the "date on which the entirety of the state direct appellate review process was completed." 555 U.S. at 120-121.

In so holding, *Jimenez* made clear that, while Section 2244(d)(1)(A) certainly includes the certiorari review timeframe as outlined in this Court's postconviction relief cases, 555 U.S. at 119-120, when cases do not fit that mold, "it is the plain language of § 2244(d)(1)(A)" that controls and "points to" the end of "direct appellate proceedings in *state court*" under state law as the proper measure of finality, 555 U.S. at 120-121 (emphasis added).

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[6] Perhaps it would have been grammatically purer for petitioner to have argued in terms of the "late[r] of" the two subsection (d)(1)(A) dates (*see* Resp. Br. 42). But that alteration would have been unfair to this Court's statutory construction task and likely just as intolerable to respondent.

Respondent's claim (Br. 50-51) that *Jimenez* did not apply the direct-review prong is misplaced. To begin with, this Court explained that state law "reopened *direct review*" and "'restore[d] the pendency of the direct appeal,'" and it was "the conclusion of direct appellate proceedings" that "pinpoint[ed] the uniform date of finality." 555 U.S. at 120-121 & n.4 (emphasis added).

Respondent is correct, though, that the reopening created a new possibility that the expiration-of-time clause might ultimately terminate the second round of litigation. But what is critical here is that, after the time for appeal had expired due to Jimenez's failure to appeal to the State's highest court, 555 U.S. at 116, Jimenez's conviction would have been irretrievably final under respondent's test. That is because respondent stakes his interpretation on cases falling exclusively in either the direct-review clause or the expiration-of-time clause, but never both. And respondent's position further hinges on planting defendants (like Jimenez and Gonzalez) who do not seek review in the state's highest court firmly in the expiration-of-time prong.

Jimenez, however, proves that a single case can fall within both clauses because, under state law, direct review can continue after the time to appeal to a State's highest court has expired. And when that happens, the later date prevails. In short, the "'linear limitations period'" unsuccessfully sought by respondent in *Jimenez*, 555 U.S. at 117, works no better here because "the plain language of § 2244(d)(1) * * * points to" the actual "conclusion of direct appellate proceedings in state court" under

state law, not wooden federal rules of finality that operate heedless of state law. *Id.* at 121.

Clay v. United States, 537 U.S. 522 (2003), does not help respondent either. Fundamentally, his analogy to federal prisoners (Br. 50) forgets that, in this setting, the finality determination is simpler for federal prisoners because (i) there is just one higher court after intermediate appellate review, not two courts; (ii) as a result, the counting of certiorari time for the finality of federal convictions is virtually automatic because, unlike in state court, it is the only remaining step in the federal appellate process; and (iii) by law, the federal court of appeals' mandate will always issue before the period for seeking certiorari review expires, so no conflict between the conclusion of direct review and the expiration of time for review arises. *Compare* Fed. R. App. P. 41 & 40 (mandate issues 21 days after entry of court of appeals judgment), *with* 28 U.S.C. § 2101(c) (90-day post-judgment window for certiorari).

Thus, the fact that the expiration of time for seeking certiorari review, in practice, uniformly dictates finality following federal appellate review is unsurprising. But respondent errs in equating that computational reality with a determination, unanchored in statutory text, that direct review of *state* convictions can never conclude anywhere outside of this Court's certiorari process.

Respondent is correct, moreover, that *Clay* recognized Section 2244(d)(1)(A)'s "uniform federal rule," 537 U.S. at 531. But respondent admits (Br. 49 n.5) that satisfaction of that federal rule turns upon state law when the expiration-of-review prong is at issue. And *Clay* itself compared this uniform federal

rule to the "'properly filed'" standard under Section 2244(d)(2), which is satisfied by reference to "the applicable [state] laws and rules governing filings." *Clay*, 537 U.S. at 531 (citing *Artuz v. Bennett*, 531 U.S. 4, 8 (2000)). Section 2244(d)(1)(A)'s direct-review prong is no different.

Respondent's reliance (Br. 46 n.4) on *Clay*'s discussion of the background understanding of finality in the postconviction context for retroactivity purposes under *Teague v. Lane*, 489 U.S. 288 (1989), hurts rather than helps his argument. In cases where review is not sought in the State's highest court, that postconviction background practice references state law to determine when finality occurs for retroactivity purposes. *See* Pet. Br. 41 (citing *Losh v. Fabian*, 592 F.3d 820, 824-825 (8th Cir. 2010); *Wheeler v. Jones*, 226 F.3d 656, 659 (6th Cir. 2000)). Respondent has no answer to those cases, and does not dispute the existence of that background rule.

B. Unlinking Finality From State Law Would Put Section 2244's Finality Rule And Its Limitations Period At Cross Purposes

Respondent's position not only runs headlong into contrary text and precedent, but it also would put different provisions of Section 2244(d) at cross purposes. Section 2244(d)(1) provides a one-year period within which state prisoners must file an application for federal habeas corpus review. Consistent with AEDPA's comity purpose, Section 2244(d)(2) tolls that limitations period while a properly filed state postconviction or collateral relief proceeding is pending to promote exhaustion and to

give "state courts a *fair* opportunity to act on the[] claims." *O'Sullivan*, 526 U.S. at 844-845.

Incorporating state law into the determination of when Section 2244(d)(1)(A)'s federal rule of finality is satisfied ensures that the limitations period on the federal action does not commence until state law permits the prisoner to file a state habeas action. *See* Pet. Br. 43 n.12 (listing States, including Texas, that forbid the commencement of state habeas review prior to the time state law renders a conviction final).

Respondent's position, by contrast, divorces the finality of convictions from the ripeness of habeas review, leaving potentially significant periods of time during which the prisoner's Section 2244(d)(1) federal limitations period is running while Section 2244(d)(1)'s finality rule leaves the prisoner helpless to either file in federal court or to toll the running of the time. Indeed, under respondent's interpretation, the federal clock could start running before petitioners would be allowed to file *federal* habeas petitions as well. Federal courts have long refused as a matter of comity to entertain federal habeas petitions as long as "the judgment was not final within the state court system." *Fay v Noia*, 372 U.S. 391, 417-418 (1963), *overruled on other grounds*, *Coleman v. Thompson*, 501 U.S. 722 (1991); *see also Rose v. Lundy*, 455 U.S. 509, 518 (1982) (comity requires waiting until state courts "have had an opportunity to pass upon the matter") (internal citations omitted).

Although petitioner emphasized these problems before (Br. 44-46), respondent offers no answer, at all, simply ignoring the statutory discord his reading would sow. But, absent the type of clear

congressional direction that is lacking here, this Court will not read a statute as commencing the running of limitations periods at a time when the same federal law forbids the party from filing suit. "While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute." *Reiter v. Cooper*, 507 U.S. 258, 267 (1993). That principle should apply with even greater force here where the consequence of such an anomalous statutory reading would be to obstruct access to the Great Writ.

Finally, respondent's concern (Br. 51-52) that a "state-sensitive" interpretation of Section 2244(d)(1)(A)'s first prong will be burdensome forgets that States have long experience administering their own direct-review processes in criminal cases and, for their own purposes, have commonly clarified when direct review ends and state postconviction relief can commence.

In any event, numerous other provisions of AEDPA generally and Section 2244(d) in particular already require similar reference to state law, and have done so without bedeviling the administration of AEDPA—or certainly not complicating it any more than respondent's state-*in*sensitive approach would. *See Carey v. Saffold*, 536 U.S. 214 (2002) (incorporating state-specific procedures into Section 2244(d)(2)'s tolling provision). Nor did this Court consider the incorporation of state-law processes into Section 2244(d)(1)(A) to be at all unworkable in

Jimenez. If doubt arises, courts can simply follow this Court's lead in *Jimenez*: the conclusion of direct review occurs when the state appellate court can no longer "modif[y]" its own decision because it has lost jurisdiction. 555 U.S. at 120.[7]

C. The Expiration of Time For Petitioner To Seek Direct Review Includes The Certiorari Timeframe

If respondent is correct that Section 2244(d)(1)(A) dictates an inflexible time period that is tied tightly to this Court's certiorari review and is so insensitive to state law that the finality of a state conviction has nothing to do with when the conviction actually became final, then the inflexibility of that rule must run both ways. And under that rule, petitioner's conviction did not become final until the 90-day time period for seeking certiorari expired after his last appellate judgment. *See* Pet. Br. 6. To be sure, that petition likely would have encountered a jurisdictional denial or dismissal. But just as Section 2244(d)(1)(A) does not condition applicability of the 90-day time period on a petition's presentation of non-frivolous claims for this Court's review—which

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[7] Respondent's belated effort to cast doubt on whether the mandate determines the finality of criminal convictions (Br. 54 n.6) mixes apples and oranges. His only authority is a single justice's concurring opinion in a *civil* case that analyzed the mandate's unique role in *civil* appeals. Resp. Br. 54 n.6. That has nothing to do with the Texas Court of Criminal Appeals' long-settled law making the mandate in criminal cases the determinant of both the finality of convictions and the ripeness of state habeas proceedings.

are equally jurisdictionally barred, *see* Pet. Br. 55 n.18; SG Br. 16—neither should the time period for petitioner be conditioned on the merits of a potential petition.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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October 14, 2011

AMICUS CURIAE BRIEF

No. 10-895

In the Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ, PETITIONER

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE , CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The United States will address the following question:

Whether the court of appeals had jurisdiction to issue a certificate of appealability under 28 U.S.C. 2253(c) and to adjudicate petitioner's appeal.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 8
Argument:
A certificate of appealability that fails to conform to the requirements of 28 U.S.C. 2253(c) does not confer jurisdiction on the court of appeals to review the denial of federal habeas corpus relief 12
A. Section 2253(c) prescribes a statutory limitation on the adjudicatory authority of the courts of appeals 12
1. The text of Section 2253(c) makes clear that a properly issued COA is a jurisdictional requirement 13
2. The placement of Section 2253(c) within the federal habeas statutes demonstrates that the provision sets forth a jurisdictional requirement 18
3. The historical treatment of the COA requirement makes clear that Section 2253(c) prescribes a jurisdictional requirement for taking an appeal 22
4. The purpose of Section 2253(c) is to limit the authority of the courts of appeals to adjudicate appeals from the denial of habeas petitions 25
B. The practical concerns expressed by petitioner do not justify treating Section 2253's requirements as nonjurisdictional 26
C. Because the COA did not comply with the requirements of Section 2253(c), the court of appeals did not have jurisdiction over petitioner's appeal 29

Table of Contents—Continued: Page

Conclusion 32
Appendix – Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

American Red Cross v. *S.G.*, 505 U.S. 247 (1992) 26
Ankenbrandt v. *Richards*, 504 U.S. 689 (1992) 23
Arbaugh v. *Y & H Corp.*, 546 U.S. 500 (2006) 16, 19
Arizona Christian Sch. Tuition Org. v. *Winn*, 131 S. Ct. 1436 (2011) 32
Bailey v. *United States. Dep't of Army Corps of Eng'rs*, 35 F.3d 1118 (7th Cir. 1994) 21
Barefoot v. *Estelle*, 463 U.S. 880 (1983) 3
Becker v. *Montgomery*, 532 U.S. 757 (2001) 22
Bell v. Hood, 327 U.S. 678 (1946) 16
Bilik v. *Strassheim*, 212 U.S. 551 (1908) 23
Bowles v. *Russell*, 551 U.S. 205 (2007) 2, 20, 21, 26
Dolan v. *United States*, 130 S. Ct. 2533 (2010) 13
Garcia v. *Walsh*, 20 F.3d 608 (5th Cir. 1994) 22
Gebhart v. *Amrine*, 117 F.2d 995 (10th Cir. 1941) 23
Grable & Sons Metal Prod. Inc. v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) 16
Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011) 8, 12, 13, 18, 19, 24
Hohn v. *United States*, 524 U.S. 236 (1998) 23, 24, 31
Horizon Air Indus. v. *National Mediation Bd.*, 232 F. 3d 1126 (9th Cir. 2000), cert. denied, 533 U.S. 915 (2001) 17
Jeffries v. *Barksdale*, 453 U.S. 914 (1981) 23

Cases—Continued: Page

Jimenez v. *Quarterman*, 555 U.S. 113 (2009) 31
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 2, 12, 13, 27, 28
Lawrence v. *Florida*, 549 U.S. 327 (2007) 7
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 31
Medellin v. *Dretke*, 544 U.S. 660 (2005) 24
Miller-El v. *Cockrell*, 537 U.S. 322 (2003) 13, 15, 16, 24, 25
Millslagle v. *Olson*, 130 F.2d 212 (8th Cir. 1942) 23
Moskal v. *United States*, 498 U.S. 103 (1990) 18
Patrick, Ex Parte, 212 U.S. 555 (1908) 22
Reed Elsevier, Inc. v. *Muchnick*, 130 S. Ct. 1237 (2010) ..... *passim*
Roberts v. *Cockrell*, 319 F.3d 690 (5th Cir. 2003) 6
Rountree v. *Balicki*, 640 F.3d 530 (3d Cir. 2011) 20
Santiago Salgado v. *Garcia*, 384 F.3d 769 (9th Cir. 2004), cert. denied, 544 U.S. 931 (2005) 2
Schenk v. *Plummer*, 113 F.2d 726 (9th Cir. 1940) 23
Slack v. *McDaniel*, 529 U.S. 473 (2000) 4, 6, 25, 31
Smith v. *Chrans*, 836 F.2d 1076 (7th Cir. 1988) 4, 26
Stella v. *Kelley*, 63 F.3d 71 (1st Cir. 1995) 16
Torres v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988) 20, 21, 22
Union Pacific R.R. Co. v. *Brotherhood of Locomotive Eng'rs and Trainmen Gen. Comm. on Adjustment*, 130 S. Ct. 584 (2009) 20
United States v. *Brooks*, 245 F.3d 291 (3d Cir. 2001) ... 20
United States v. *Baldwin*, 49 F.2d 262 (7th Cir. 1931) .. 23

Cases—Continued: Page

Wilson v. *Lanagan*, 79 F.2d 702 (1st Cir. 1935) 23
Zipes v. *Trans World Airlines*, 455 U.S. 385 (1982) 19

Constitution, statutes and rules:

U.S. Const.:
Amend. V 6
Amend. VI 7, 27, 30
Act of Mar. 10, 1908, ch. 76, 35 Stat. 40 ..... 2, 22
Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 827 2
Act of Feb. 13, 1925, ch. 229, 43 Stat. 940:
§ 6 2
§ 6(d) 23
§ 13 23
Act of June 25, 1948, ch. 646, § 2253, 62 Stat. 967 3
Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1217 ..... 3, 10, 22, 23, 25
28 U.S.C. 1254(1) 24
28 U.S.C. 1331 ..... 16, 19
28 U.S.C. 2107(a) 21
28 U.S.C. 2107(c) (2006 & Supp. III 2009) 21
28 U.S.C. 2244(d)(1) 6
28 U.S.C. 2253 ..... 3, 9, 20, 25
28 U.S.C. 2253(a) 9, 20
28 U.S.C. 2253(b) 20
28 U.S.C. 2253(c) ..... *passim*
28 U.S.C. 2253(c)(1) ..... *passim*
28 U.S.C. 2253(c)(1)(B) 1, 3
28 U.S.C. 2253(c)(2) ..... *passim*

Statutes and rules—Continued: Page

28 U.S.C. 2253(c)(2)-(3) 14, 29
28 U.S.C. 2253(c)(3) ..... *passim*
28 U.S.C. 2254 (2006 & Supp. III 2009) 1, 5, 7, 8
28 U.S.C. 2255 (2006 & Supp. III 2009) 1
Rules Governing Section 2254 Cases in the United States District Courts:
Rule 11 29
Fed. R. App. P.:
Rule 3 21
Rule 3(c) 21
Rule 4(a) 20
Rule 4(a)(6) 21
Rule 22 29
Fed. R. Civ. P. 15
Sup. Ct. R. 22 30
Tex. R. App. P. 68.2(a) 5

Miscellaneous:

Webster's Third New International Dictionary (1993) ... 17

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RAFAEL ARRIAZA GONZALEZ, PETITIONER

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The first question presented concerns the jurisdictional status of the certificate-of-appealability (COA) requirement imposed by 28 U.S.C. 2253(c) in federal habeas corpus cases. Although this case arises on federal habeas review of a state conviction under 28 U.S.C. 2254 (2006 & Supp. III 2009), the COA requirement also applies to appeals by federal prisoners challenging the legality of their detention under 28 U.S.C. 2255 (2006 & Supp. III 2009). See 28 U.S.C. 2253(c)(1)(B). The United States therefore has a substantial interest in the Court's resolution of the first question presented. In addition, as the most frequent litigant in the federal

courts, the United States also has a substantial interest in the sound and consistent application of rules governing whether certain statutory requirements are jurisdictional limitations on the adjudicatory authority of the federal courts, as opposed to mandatory but non-jurisdictional claim-processing rules. The United States has previously participated as *amicus curiae* in cases raising similar issues. See, *e.g.*, *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010); *Bowles* v. *Russell*, 551 U.S. 205 (2007); *Kontrick* v. *Ryan*, 540 U.S. 443 (2004).

STATEMENT

1. a. Since 1908, Congress has required state prisoners to obtain certification before pursuing an appeal of a final decision in a habeas corpus action. When Congress enacted the first certification requirement in 1908, state prisoners were authorized to appeal the denial of a habeas petition directly to the Supreme Court. Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 827; *Santiago Salgado* v. *Garcia*, 384 F.3d 769, 771 (9th Cir. 2004), cert. denied, 544 U.S. 931 (2005). The 1908 statute barred a state prisoner from appealing such a decision unless the district court or a justice of this Court "shall be of the opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance." Act of Mar. 10, 1908, ch. 76, 35 Stat. 40.

In 1925, Congress broadened the jurisdiction of the courts of appeals to include appeals of final decisions in habeas actions, and it concomitantly expanded the so-called "certificate of probable cause" (CPC) requirement to proceedings in the courts of appeals. Act of Feb. 13, 1925, ch. 229, § 6, 43 Stat. 940. In 1948, as part of its codification of the federal code, Congress reaffirmed the

CPC requirement by enacting 28 U.S.C. 2253, which provided that a state prisoner could not appeal the denial of a habeas petition "unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." Act of June 25, 1948, ch. 646, § 2253, 62 Stat. 967.

Although the CPC requirement had existed since 1908, Congress did not provide a statutory standard for gauging whether a prisoner's application presented probable cause justifying the issuance of a CPC. The Court addressed that issue in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), explaining that an applicant has demonstrated probable cause to justify the issuance of a CPC if he "make[s] a 'substantial showing of the denial of [a] federal right.'" *Id.* at 893 (citation omitted).

b. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1217, which contains the present-day certification requirement. App., *infra*, 1a. AEDPA amended the certification requirement in a number of relevant respects. First, Congress changed the name of the certificate to a "certificate of appealability" (COA). 28 U.S.C. 2253(c)(1). Second, Congress applied the certification requirement for the first time to appeals from federal prisoners. 28 U.S.C. 2253(c)(1)(B). Third, Congress codified this Court's holding in *Barefoot* that a certificate may issue only upon a "substantial showing" of the denial of a right. 28 U.S.C. 2253(c)(2). Congress further specified, however, that the right must be "constitutional" in nature, not simply a "federal" right. *Ibid.* Finally, Congress specified that the COA must identify the specific issues satisfying the "substantial showing" standard. 28 U.S.C. 2253(c)(3). This abrogated pre-AEDPA circuit court precedent that denied district

courts the authority to limit certificates to specific issues or otherwise circumscribe the issues that the court of appeals could consider once a certificate had been issued. See, *e.g.*, *Smith* v. *Chrans*, 836 F.2d 1076, 1079-1080 (7th Cir. 1988) (per curiam).

In *Slack* v. *McDaniel*, 529 U.S. 473 (2000), the Court explained the operation of Section 2253(c)(2)'s "substantial showing" requirement when a district court denied a habeas petition on procedural grounds. In those circumstances, a COA "should issue (and an appeal of the district court's order may be taken) if the prisoner shows * * * that jurists of reason" both (1) "would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (2) "would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478.

2. a. On June 2, 1995, Roberto Velasquez was shot and killed near an apartment complex in Irving, Texas. J.A. 107. Two eyewitnesses identified petitioner as the shooter. *Ibid.* One of the eyewitnesses was Velasquez's sister, Luz Del Cid, who told police that petitioner and Velasquez had grown up together in Morazan, Guatemala. *Ibid.*

On June 28, 1995, petitioner was indicted for Velasquez's murder. Law enforcement authorities, however, were unable to locate petitioner to arrest him. J.A. 107-108. In August 1995, Del Cid informed police that she had received a phone call from her mother in Morazan informing Del Cid that petitioner was in Guatemala. J.A. 108. Local police pursued several leads into 1996, but they learned nothing further about petitioner's whereabouts until he was incarcerated in Guatemala for three unrelated murders in March 2001. J.A. 108-109. After delays due to diplomatic issues and petitioner's

appeals in the Guatemala courts, in July 2004, petitioner was extradited to the United States. J.A. 109-110.

b. Petitioner moved to dismiss the state-court murder indictment on the grounds that the nearly ten-year delay between his indictment and trial violated his Sixth Amendment right to a speedy trial. J.A. 110-111. The state trial court denied the motion. J.A. 111. Following a jury trial, petitioner was convicted of murder, and the trial court sentenced petitioner to 30 years of imprisonment. J.A. 106, 110-111.

c. On July 12, 2006, the Texas Court of Appeals affirmed petitioner's conviction. J.A. 106-124. Under Texas law, petitioner had 30 days from the entry of judgment—until August 11, 2006—to petition the Texas Court of Criminal Appeals for discretionary review. See Tex. R. App. P. 68.2(a). Petitioner did not seek discretionary review, Pet. App. 12a, and the Texas Court of Appeals issued its mandate on September 26, 2006. J.A. 151.

d. In 2007, petitioner filed two separate petitions for writs of habeas corpus in the Texas Court of Criminal Appeals. Pet. App. 2a. The first petition was dismissed for failure to comply with the Texas Appellate Rules. *Ibid.* The second petition was denied. J.A. 133.

3. a. On January 24, 2008, petitioner filed an application for a writ of habeas corpus in federal district court under 28 U.S.C. 2254 (2006 & Supp. III 2009). J.A. 134-136; Pet. App. 2a. In the application, petitioner asserted four grounds for relief: (1) the delay between his indictment and trial violated his Sixth Amendment rights to a speedy trial and effective assistance of counsel; (2) the inconsistencies in witness testimony and faulty witness recollections violated his due process rights; (3) the state violated his due process rights by refusing

to provide him with copies of various records; and (4) the courts below commented on his decision to invoke his Fifth Amendment privilege against compelled self-incrimination. J.A. 142-145.

A magistrate judge recommended that the district court dismiss the petition as time-barred because it was filed more than one year after petitioner's conviction became final within the meaning of 28 U.S.C. 2244(d)(1). Pet. App. 11a-21a. The magistrate judge reasoned that, under *Roberts* v. *Cockrell*, 319 F.3d 690 (5th Cir. 2003), the one-year clock began to run on August 11, 2006, the deadline for petitioner to seek discretionary review in the Texas Court of Criminal Appeals. Pet. App. 14a-15a. Petitioner objected to the magistrate judge's recommendation on the grounds that the one-year limitation period should have commenced on the date that the state appellate court's mandate issued, which would have made his federal habeas petition timely. J.A. 332-335. The district court overruled petitioner's objection and dismissed the petition as time-barred. Pet. App. 9a-10a.

b. Petitioner signed and provided to prison authorities a copy of a document for filing entitled "Timely Notice of Appeal With Pro-Se Petition for Certificate of Appealability." J.A. 155-158. The document identified four "Questions at Issue," the first two of which related to the district court's timeliness determination, and the last two of which related to petitioner's access-to-records claims. J.A. 156-158. The district court denied petitioner's request for a COA, J.A. 162-164, stating in a written order that "[p]etitioner has failed to demonstrate that reasonable jurists would find it debatable whether the district court was correct in finding that the habeas corpus petition is barred by the statute of limitations," J.A. 164 (citing *Slack*, 529 U.S. at 484-485).

Petitioner next asked the court of appeals for a COA allowing him to appeal (1) whether his Section 2254 petition was timely, and (2) whether his Sixth Amendment speedy-trial rights were violated. J.A. 175. With respect to the timeliness issue, petitioner argued that the district court had erred in relying on the Fifth Circuit's interpretation of Section 2244(d)(1)(A) in *Roberts* because that decision had been abrogated by *Lawrence* v. *Florida*, 549 U.S. 327 (2007). J.A. 176. Judge Garza entered an order granting a COA. J.A. 346-347. The order stated that "[a] COA is GRANTED as to the question whether *Roberts* has been overruled by *Lawrence*, and, if so, whether the habeas application was timely filed because Gonzalez's conviction became final, and thus the limitation period commenced, on the date the intermediate state appellate court issued its mandate." J.A. 347.

4. The court of appeals affirmed. Pet. App. 1a-8a. The court held that petitioner's appeal became final when the time for seeking direct review expired. As a result, the court concluded, petitioner's Section 2254 petition was untimely and had been properly dismissed. *Id.* at 5a-8a. The court observed that petitioner had also argued on appeal that his right to a speedy trial was violated, that his trial counsel was ineffective, that the trial court had admitted tainted evidence, and that the state violated his due process rights by failing to provide him with court records. *Id.* at 3a n.1. The court explained, however, that "[b]ecause COAs were not granted on these issues, we lack jurisdiction to consider these claims." *Ibid.* (citation omitted).

5. Petitioner filed a petition for a writ of certiorari seeking review of the question whether his federal habeas petition was timely. Pet. i. The State's brief in

opposition defended the court of appeals' decision on the merits, and it further asserted that the court of appeals had lacked jurisdiction over the appeal because the COA identified only a procedural issue for appellate review, without also certifying a specific issue for which petitioner had "made a 'substantial showing of the denial of a *constitutional* right,'" as required by 28 U.S.C. 2253(c)(2) and (3). Br. in Opp. 3 (emphasis added). The State acknowledged that it had not objected to the defective COA in the court of appeals and that the court of appeals had decided the timeliness question without discussing whether the COA had been properly issued on that nonconstitutional claim. *Id.* at 3, 16-17.

The Court granted the petition for a writ of certiorari on the question whether petitioner's Section 2254 petition was timely (the second question presented). The Court added *sua sponte* the additional issue identified in the State's brief in opposition (the first question presented): "Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal?"

SUMMARY OF ARGUMENT

A. A statutory prescription is a jurisdictional limitation on a court's adjudicatory authority if Congress provides a "'clear' indication that [it] wanted the rule to be 'jurisdictional.'" *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011). Congress's intent is determined by examining the text, context, relevant historical treatment, and purpose of the statutory provision. Those factors reveal that Congress intended Section 2253(c) to embody jurisdictional requirements. If a COA does not comply with those requirements, the court of appeals lacks jurisdiction to adjudicate the appeal.

1. The text of Section 2253(c) indicates that the COA requirement is jurisdictional. Section 2253(c)(1) says that an appeal "may not be taken" without a COA, and Section 2253(c)(2) and (3) set forth the substantive requirements governing when a COA may be issued and what information it must contain. Section 2253(c)(2)'s requirement that a COA may issue only upon the applicant's "substantial showing of the denial of a constitutional right" calls for a preliminary inquiry similar to the inquiry that a federal court would undertake to evaluate the existence of federal question jurisdiction. It requires the court to determine whether a petitioner's appeal falls within the class of cases that the court of appeals has authority to adjudicate—those that raise debatable constitutional questions. Section 2253(c)(3)'s requirement that a COA must indicate the "specific issue or issues" meeting that standard requires the court to state, in writing, what specific constitutional issue or issues satisfy the criteria for appellate review. A properly issued COA is a prerequisite to the appeal on the merits.

2. The placement of the COA requirement within the habeas statutes further supports Section 2253(c)'s status as a jurisdictional requirement. 28 U.S.C. 2253 is a provision entitled "Appeal," and Subsection (a) states that a final order denying habeas relief "shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." Section 2253(a) grants jurisdiction in habeas cases, and Section 2253(c) limits that jurisdiction to cases that have been certified to contain a substantial constitutional claim. The inclusion of the COA requirement in a jurisdiction-granting provision is a strong contextual signal that a compliant COA is a jurisdictional requirement.

3. The historical backdrop against which AEDPA was enacted further confirms that the COA requirement is jurisdictional. Since Congress enacted the first certification requirement in 1908, this Court and the courts of appeals have treated the absence of a CPC or COA as a jurisdictional defect. Thus, when Congress codified the certification requirement and added further restrictions to it through AEDPA in 1996, it understood the COA requirement to have jurisdictional consequences.

4. The text, structure, and history of Section 2253(c) reveal that the purpose of the COA requirement, and Congress's amendments to it in 1996, is to limit the jurisdiction of the courts of appeals over district court orders denying habeas relief to those cases raising substantial constitutional questions. When Congress added Sections 2253(c)(2) and (3) to the COA requirement in 1996, that requirement had long been viewed as jurisdictional. The new limitations on issuance of a COA were intended to narrow appellate review from cases involving any federal right to only cases involving constitutional rights, 28 U.S.C. 2253(c)(2), and from all issues a habeas petitioner raised to only those issues specified in the COA, 28 U.S.C. 2253(c)(3).

B. 1. Although the jurisdictional status of Section 2253(c) means that an appeal may sometimes be dismissed after briefing when the parties and the court do not timely realize that the COA was erroneously issued, that result occurs any time a jurisdictional defect is noticed after litigation is underway. The courts, however, cannot exercise jurisdiction Congress has not conferred. Congress has set forth specific requirements that must be satisfied before an appeal "may be taken" from the denial of habeas relief, and the courts of appeals lack

statutory authority to adjudicate appeals when those requirements are not satisfied.

2. Concluding that the requirements of Section 2253(c) are jurisdictional would not be inequitable to habeas petitioners who have no role in drafting COAs. If the court of appeals makes an error in drafting a COA in a case where the prisoner has made the required showing of the denial of a constitutional right, a court of appeals can amend the COA to encompass review of that claim. If a COA is erroneously issued in the absence of the statutory requirements, it is not inequitable to the prisoner for his case to be dismissed. And the COA requirement as a whole promotes the efficient allocation of judicial resources because it ensures that appeals do not proceed unless they meet the congressionally established criteria. Treating the COA requirement as jurisdictional encourages all concerned to be vigilant about compliance and thus reduces the volume of improper appeals.

C. Because the COA in this case did not comply with the requirements set forth in Section 2253(c), the judgment of the court of appeals must be vacated. The COA certified only a procedural question, and it failed to identify any substantial constitutional issue for review. Because the COA failed to comply with the requirements set forth in Section 2253(c), the court of appeals lacked jurisdiction to resolve the procedural question certified for review.

Although Justices of this Court are authorized by Section 2253(c) to issue COAs, none should issue here. Petitioner has not applied to any Justice of this Court for a COA, nor has any party sought review or modification of Judge Garza's order granting a COA limited to a procedural statute-of-limitations issue. Even if a circuit

justice were now inclined to issue a COA identifying a constitutional issue for review, the Court could not review the merits of a procedural issue that the court of appeals lacked jurisdiction to decide.

ARGUMENT

A CERTIFICATE OF APPEALABILITY THAT FAILS TO CONFORM TO THE REQUIREMENTS OF 28 U.S.C. 2253(c) DOES NOT CONFER JURISDICTION ON THE COURT OF APPEALS TO REVIEW THE DENIAL OF FEDERAL HABEAS CORPUS RELIEF

A. Section 2253(c) Prescribes A Statutory Limitation On The Adjudicatory Authority Of The Courts Of Appeals

In recent years, the Court has cautioned against imprecise use of the "jurisdictional" label, which can elide "the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237, 1244 (2010) (alteration in original; citation omitted). To reinforce these critical differences, the Court has encouraged courts and litigants to use the label "jurisdictional" "not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick* v. *Ryan*, 540 U.S. 443, 454-455 (2004). Claim-processing rules, in contrast, "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011).

To determine whether a statutory prescription is a jurisdictional limitation on a court's adjudicatory authority, courts must "look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdic-

tional.'" *Henderson*, 131 S. Ct. at 1203 (citation omitted). That indication, however, does not turn on Congress's use of "magic words." *Ibid.* This Court has explained that Congress's intent must be determined through traditional tools of statutory construction by examining the "text, context, and relevant historical treatment" of the limitation at issue, *Reed Elsevier*, 130 S. Ct. at 1246 (citation omitted), and "what they reveal about the purposes [the limitation] is designed to serve," *Dolan* v. *United States*, 130 S. Ct. 2533, 2538 (2010).

The text, context, and historical treatment of the COA requirement demonstrate that Congress intended Section 2253(c) to embody jurisdictional requirements. Because the COA in this case failed to satisfy those requirements, the court of appeals lacked authority to resolve the procedural issue that was certified for review.

1. The text of Section 2253(c) makes clear that a properly issued COA is a jurisdictional requirement

a. The plain text of Section 2253(c) demonstrates that the COA requirement is not simply a rule that "seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203. Rather, the COA statute is a "prescription[] delineating the classes of cases (subject-matter jurisdiction) * * * falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455.

Section 2253(c)(1) states that, "[u]nless a circuit justice or judge issues a certificate of appealability, *an appeal may not be taken*" from a final order denying habeas relief. 28 U.S.C. 2253(c)(1) (emphasis added). In *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), the Court

concluded based on this statutory language that the issuance of a COA is "a jurisdictional prerequisite" to an appeal, and that "until a COA has been issued[,] federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.* at 336.

As amended in 1996, Section 2253(c) no longer authorizes appellate jurisdiction based merely on the issuance of an unadorned certificate. The statute provides that a COA "may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right," and the statute further specifies that the COA "shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." 28 U.S.C. 2253(c)(2)-(3). Given those explicit cross-references to the provision stating that an appeal "may not be taken" without a COA, 28 U.S.C. 2253(c)(1), the subsections setting forth the required content of the COA are subsumed by that jurisdictional language.

b. Petitioner concedes (Br. 14) that the COA requirement set forth in Section 2253(c)(1) is "a jurisdictional precondition to appellate review." Petitioner contends (Br. 21-29), however, that the substantive COA requirements set forth in Subsections (c)(2) and (3) should be treated differently. Petitioner's effort to separate Section 2253(c)'s three interlinked requirements is unpersuasive.

i. Petitioner attempts (Br. 22-23) to differentiate Subsection (c)(2) from Subsection (c)(1) by noting that Subsection (c)(1) refers to what a circuit judge or justice must do, while Subsection (c)(2) "speaks in terms of what [an applicant] must 'show.'" Based on that distinction, petitioner contends (Br. 22) that Subsection (c)(2) is analogous to a nonjurisdictional pleading requirement like those contained in Federal Rules of Civil Procedure

8(a) and 12(b)(6), or to the statutory requirement that a copyright holder must register his work before suing for copyright infringement, which this Court has held is "a precondition to filing a claim that does not restrict a federal court's subject matter jurisdiction," *Reed Elsevier*, 130 S. Ct. at 1241.

Petitioner misreads Subsection (c)(2). Although Subsection (c)(2) references the showing that the applicant must make in support of a COA, the statute is explicitly aimed at the court responsible for granting or denying the application. It states that a justice or judge may issue a COA "under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2); see *Miller-El*, 537 U.S. at 336-337 (referring both to showing that the prisoner must make and to inquiry that court must conduct). The "showing" referred to in Subsection (c)(2) is thus not analogous to a procedural step that an applicant is required to take without impairing the court's authority to adjudicate the case on the merits when the party fails to take that step. See *Reed Elsevier*, 130 S. Ct. at 1241. Rather, the "substantial showing" requirement is an inquiry that a judge must conduct to determine whether "an appeal may * * * be taken," 28 U.S.C. 2253(c)(1), which petitioner acknowledges is a jurisdictional inquiry.

Nor is the certification requirement similar to a pleading requirement in the Federal Rules of Civil Procedure. The federal rules provide procedures for courts with subject matter jurisdiction over a claim to dismiss the claim on the merits at the pleading stage. The COA statute, in contrast, states that an appeal "may not be taken" without a COA, 28 U.S.C. 2253(c)(1), and that a COA may issue "only if the applicant has made a sub-

stantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2). If the applicant does not make that initial showing, the court of appeals may not hear the appeal.

In this respect, the limited inquiry into the merits of petitioner's claim under Section 2253(c)(2) to determine whether the appeal presents a debatable constitutional question is no different than a threshold inquiry that a federal court would conduct to determine whether a case presents a federal question under 28 U.S.C. 1331. See *Gruble & Sons Metal Products, Inc.* v. *Darue Eng'g*, 545 U.S. 308, 316-319 (2005). Indeed, the screening function performed by Section 2253(c)(2) is comparable to the inquiry under 28 U.S.C. 1331. "A claim invoking federal-question jurisdiction under 28 U.S.C. 1331 * * * may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is * * * 'wholly insubstantial and frivolous.'" *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006) (quoting *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946)). A judge considering an application for a COA does not resolve the merits of an appeal. *Miller-El*, 537 U.S. at 336. Rather, Section 2253(c) requires the court to take a preliminary look at the petitioner's claim to determine its substantiality—the condition that must be met to fall within the class of cases that the court of appeals has authority to adjudicate. *Ibid.*[1]

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[1] The courts of appeals have used this approach to evaluate subject matter jurisdiction under other federal statutes and jurisdictional doctrines. See, *e.g.*, *Stella* v. *Kelley*, 63 F.3d 71, 75 (1st Cir. 1995) (to determine whether court of appeals has jurisdiction over an interlocutory appeal of a district court order rejecting a qualified immunity defense, court must determine whether appeal involves "the existence *vel non* of a constitutional right," as opposed to "the fact-based question of what

ii. Petitioner further contends (Br. 25) that Congress's use of the word "indicate" to describe how the court must identify the issues that satisfy the "substantial showing" requirement demonstrates that Section 2253(c)(3) is not jurisdictional. According to petitioner (Br. 25-26), "[t]o 'indicate' is a less stringent statutory directive than to identify or specify, and commonly means to 'point to or toward with more or less exactness.'" Petitioner contends (Br. 26) that because the word "indicate" "lacks * * * precision and specificity," a COA that does not identify a constitutional question for review should be considered compliant if "the record as a whole" reveals one or more constitutional claims that satisfy the statutory standard set forth in Section 2253(c)(2).

As an initial matter, petitioner overlooks the common meaning of the word "indicate," which is "to state or express * * * brief[ly]" or to "state or express without going into great detail." *Webster's Third New International Dictionary* 1150 (1993). That definition, when combined with the neighboring term "specific," signal Congress's intent that the COA list the particular issues certified for review. See 28 U.S.C. 2253(c)(3) (requiring the court issuing a COA to "indicate which *specific issue or issues*" satisfy the "substantial showing" requirement) (emphasis added). Petitioner's contrary reading is untenable because it effectively reads out of the stat-

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the evidence does (or does not) show"); *Horizon Air Indus., Inc.* v. *National Mediation Bd.*, 232 F.3d 1126, 1132 (9th Cir. 2000) (court of appeals "take[s] * * * a 'peek at the merits'" to determine whether a National Mediation Board (NMB) decision involves allegations that NMB acted unconstitutionally or outside of its authority, which are the only categories of NMB decisions that federal courts have authority to review), cert. denied, 533 U.S. 915 (2001).

ute the word "specific." See *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990) ("[A] court should give effect, if possible, to every clause and word of a statute.") (citation omitted).

The specificity demanded by the text of Section 2253(c)(3) would be meaningless if, as petitioner proposes (Br. 26-27), courts simply presumed that the COA encompassed any "constitutional issue for which the petitioner made a 'substantial showing' in his application." Even if that presumption could provide some measure of specificity on the facts of this case given that petitioner pressed only one constitutional issue in the application for a COA that he submitted to the court of appeals, see NACDL Br. 14-15, petitioner does not explain how that presumption would provide any specificity in the common scenario where a prisoner alleges numerous constitutional claims for appeal. Allowing an order that certifies only a procedural issue to authorize the court of appeals to exercise jurisdiction does not honor Congress's explicit command that the judge issuing the COA must indicate the "specific issue or issues" for which the petitioner has made the required showing of the denial of a *constitutional* right. 28 U.S.C. 2253(c)(2) and (3).

2. ***The placement of Section 2253(c) within the federal habeas statutes demonstrates that the provision sets forth a jurisdictional requirement***

In addition to the statutory text, the placement of the COA requirement within the statutory scheme for habeas proceedings further demonstrates Section 2253(c)'s status as a jurisdictional requirement. See, *e.g.*, *Henderson*, 131 S. Ct. at 1205 (context and place-

ment of a statutory requirement within a statutory scheme are relevant to jurisdictional status).

a. When the Court has concluded that certain statutory requirements are not jurisdictional limitations on a court's adjudicatory authority, it has emphasized Congress's placement of the restriction in a provision separate from the provisions governing subject-matter jurisdiction. In *Arbaugh* v. *Y & H Corp.*, for example, the Court explained that the provision in Title VII limiting the statute's coverage to companies of 15 or more employees was located in a "Definitions" section of the statute separate from the grants of jurisdiction under the federal-question statute (28 U.S.C. 1331) and Title VII itself. 546 U.S. at 505-506. The Court determined that the employee-numerosity requirement was an element of the plaintiffs' claim, rather than a jurisdictional limitation on the power of the courts to adjudicate Title VII claims, reasoning that "the 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id.* at 515 (quoting *Zipes* v. *Trans World Airlines*, 455 U.S. 385, 394 (1982)).

The Court reached the same conclusion in *Reed Elsevier*, where the pre-litigation registration requirement in the Copyright Act was "located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over" copyright-infringement claims. 130 S. Ct. at 1245-1246. Most recently, in *Henderson*, the Court concluded that the 120-day statutory period for appealing the denial of veterans benefits is not jurisdictional in part based on Congress's placement of the time limit in a portion of the statute "entitled 'Procedure,'" rather than the "subchapter entitled 'Organization and Jurisdiction.'" 131 S. Ct. at 1205; see *Union*

Pacific R.R. Co. v. *Brotherhood of Locomotive Eng'rs and Trainmen Gen. Comm. on Adjustment*, 130 S. Ct. 584, 597 (2009) (the placement of the procedural rule at issue in a statutory section different from the one establishing the "powers" of the grievance board supported nonjurisdictional treatment).

b. Section 2253, in contrast, is a provision of the habeas statutes entitled "Appeal." Subsection (a) provides that a final order denying habeas relief "shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." 28 U.S.C. 2253(a). Subsection (b) clarifies that there is no right to appeal a final order in a habeas proceeding challenging detention under a federal warrant of removal. Courts of appeals have understood Section 2253(a) as a general grant of appellate jurisdiction in habeas cases, see, *e.g.*, *Rountree* v. *Balicki*, 640 F.3d 530, 536 (3d Cir. 2011), and Section 2253(b) as a limit on that jurisdiction, see *United States* v. *Brooks*, 245 F.3d 291, 293 (3d Cir. 2001) (collecting cases). The COA requirement in Section 2253(c) is likewise a limitation on, or precondition to, the exercise of appellate jurisdiction under Section 2253(a). The inclusion of the COA requirement in a provision whose other subsections grant and withdraw jurisdiction is a strong contextual signal that it is a jurisdictional requirement.

In this structural sense, Section 2253(c) resembles the statutory provisions that this Court found to establish jurisdictional limitations in *Bowles* v. *Russell*, 551 U.S. 205, 208-214 (2007), and *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988). *Bowles* involved the 30-day period for filing a notice of appeal in a civil case. Although carried into practice by the Federal Rules of Appellate Procedure, see Fed. R. App. P. 4(a), that 30-

day period—and the availability of a 14-day extension of it, Fed. R. App. P. 4(a)(6)—are prescribed by subsections of the same statute, 28 U.S.C. 2107(a); 28 U.S.C. 2107(c) (2006 & Supp. III 2009). *Bowles*, 551 U.S. at 208. The Court concluded in *Bowles* that the 30-day period in Section 2107(a) established a jurisdictional time limit, and because the maximum 14-day extension was set forth as a subsection of the same statute, 28 U.S.C. 2107(c) (2006 & Supp. III 2009), the Court held that it too was a jurisdictional limitation. 551 U.S. at 213.

Similarly, in *Torres*, the Court held that the requirement in Federal Rule of Appellate Procedure 3(c) that a notice of appeal must specify the parties taking the appeal was "a jurisdictional prerequisite." 487 U.S. at 318. In so concluding, the Court relied on an Advisory Committee Note that treated the requirements of Rules 3 and 4—the latter governing the timing of the notice of appeal—"as a single jurisdictional threshold." *Id.* at 315. Noting that the time limit in Rule 4 was jurisdictional and could not be extended, the Court declined to treat Rule 3's naming requirement differently. "Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed," the Court explained, would be "equivalent" to allowing courts to exercise the prohibited power of "extend[ing] the time for filing a notice of appeal." *Ibid.*[2]

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[2] The 1993 amendments to Fed. R. App. P. 3 abrogated the specific holding in *Torres* that failing to specify the exact name of an appealing party is a jurisdictional defect. See Fed. R. App. P. 3(c) advisory committee's note (1993) (Amendments). Although some courts have stated that the 1993 amendment "overrul[ed] *Torres*," *Bailey* v. *United States Dep't of the Army Corps of Engineers*, 35 F.3d 1118, 1119 n.3 (7th Cir.

The three subsections of Section 2253(c) similarly establish "a single jurisdictional threshold." See *Torres*, 487 U.S. at 315. If the issuance of a COA under Section 2253(c)(1) is jurisdictional (as petitioner concedes), it makes little sense to treat differently the substantive requirements of the COA set forth in Subsections (c)(2) and (c)(3). Differential treatment would have the anomalous result of giving courts of appeals the power to adjudicate habeas appeals that do not involve debatable constitutional claims, which Congress specifically meant to preclude.

3. The historical treatment of the COA requirement makes clear that Section 2253(c) prescribes a jurisdictional requirement for taking an appeal

The historical backdrop against which AEDPA was enacted further confirms the jurisdictional status of the COA requirement. *Reed Elsevier*, 130 S. Ct. at 1247-1248 ("[I]nterpretation of similar provisions in many years past[] is relevant to whether a statute ranks a requirement as jurisdictional.").

As explained above, pp. 2-3, *supra*, a certification requirement has existed since 1908 when Congress conditioned a state prisoner's appeal to this Court on the issuance of a CPC. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40. In giving effect to the 1908 statute, this Court treated the absence of a CPC as a jurisdictional bar, dismissing "for want of jurisdiction" prisoner appeals in which a CPC had not been issued. See *Ex Parte Pat-*

1994) (citing *Garcia* v. *Walsh*, 20 F.3d 608, 609 (5th Cir. 1994)), the amendment did not affect this Court's jurisdictional analysis. In *Bowles*, the Court cited *Torres* with approval in reaffirming that the time limit treated as jurisdictional in *Torres* remained so. 551 U.S. at 209-210; see *Becker* v. *Montgomery*, 532 U.S. 757, 767 (2001).

rick, 212 U.S. 555 (1908); *Bilik* v. *Strassheim*, 212 U.S. 551 (1908); see also *Jeffries* v. *Barksdale*, 453 U.S. 914, 915 (1981) (Rehnquist, J., dissenting from denial of certiorari on grounds that writ should have instead been dismissed for lack of jurisdiction because no CPC had issued).

After Congress extended habeas jurisdiction and the CPC requirement to the courts of appeals in 1925, Act of Feb. 13, 1925, ch. 229, §§ 6(d), 13, 43 Stat. 940-942, the courts of appeals followed the same course and treated a CPC as a "statutory jurisdictional requirement." *Millslagle* v. *Olson*, 130 F.2d 212, 213 (8th Cir. 1942) (per curiam). The courts regularly dismissed for lack of jurisdiction appeals taken in the absence of a CPC. See *Gebhart* v. *Amrine*, 117 F.2d 995, 996 n.1 (10th Cir. 1941) (citation omitted) ("[T]here was no finding that probable cause exists for an appeal. In the absence of such a finding, we have no jurisdiction."); see also, *e.g.*, *Wilson* v. *Lanagan*, 79 F.2d 702, 702 (1st Cir. 1935) (per curiam); *United States* v. *Baldwin*, 49 F.2d 262, 263 (7th Cir. 1931) (per curiam); *Schenk* v. *Plummer*, 113 F.2d 726, 727 (9th Cir. 1940). Thus, when Congress codified the CPC requirement in 1948, and when it amended the certification requirement in AEDPA, Congress understood the requirement to have jurisdictional consequences. See, *e.g.*, *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700-701 (1992) (applying presumption that Congress adopted historical construction of jurisdictional statute when it amended statute without altering jurisdictional provision).

This Court's post-AEDPA cases have continued to treat the COA requirement as jurisdictional. For example, in *Hohn* v. *United States*, 524 U.S. 236 (1998), the Court described "the issuance of a [COA]" as "a thresh-

old prerequisite for court of appeals jurisdiction." *Id.* at 248. And in *Miller-El*, the Court expressly stated that a COA is "a jurisdictional prerequisite," absent which "federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." 537 U.S. at 336.[3] "When a long line of this Court's decisions left undisturbed by Congress has treated a * * * requirement as jurisdictional, [the Court] will presume that Congress intended to follow that course." *Henderson*, 131 S. Ct. at 1203 (citations omitted). The uninterrupted historical treatment of Section 2253(c) and its predecessor statutes as a jurisdictional requirement confirms the jurisdictional status of Section 2253(c).[4]

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[3] Although the decisions in *Hohn* and *Miller-El* predate this Court's recent cases discussing the term "jurisdictional," the Court's statements cannot be viewed as "'drive-by jurisdictional rulings.'" See *Arbaugh*, 546 U.S. at 511. The Court in *Miller-El* characterized Section 2253(c)(1) as jurisdictional based on the statutory text, 537 U.S. at 336, which the Court has often found determinative of jurisdictional status. See *Reed Elsevier*, 130 S. Ct. at 1244. The description of the COA requirement in *Hohn* was central to the Court's conclusion that an application for a COA is a case "in" the court of appeals such that the Court has jurisdiction under 28 U.S.C. 1254(1) to review the denial of a COA. 524 U.S. at 247-248.

[4] In *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (dismissing writ of certiorari as improvidently granted), Justice O'Connor expressed a view that if no objection had been made, a COA issued on a nonconstitutional claim would authorize appellate jurisdiction over that claim. *Id.* at 678-679 (O'Connor, J., dissenting). The majority, however, stated that one reason the writ of certiorari should be dismissed as improvidently granted was that the petitioner would need to show in later proceedings that a treaty-based claim could satisfy the COA standard, even though the State had never objected to the issuance of a COA on that ground. *Id.* at 666 (per curiam).

4. The purpose of Section 2253(c) is to limit the authority of the courts of appeals to adjudicate appeals from the denial of habeas petitions

The text, structure, and history of Section 2253(c) reveal that the purpose of the COA requirement, and the 1996 amendments to it, is to limit the jurisdiction of the courts of appeals over final decisions denying habeas relief. See *Miller-El*, 537 U.S. at 337 (AEDPA "placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners").

When Congress enacted AEDPA in 1996, it added additional requirements to the COA statute—a statute that had long been viewed as jurisdictional. It did so by amending Section 2253, which is the jurisdictional provision authorizing appellate review of district court decisions denying habeas relief to prisoners. Specifically, it added the requirements as Subsections (2) and (3) after Section 2253(c)(1), which states in jurisdictional language that an appeal "may not be taken" without a COA.

The requirements Congress added to Section 2253 provide further restrictions on what the courts of appeals had previously been authorized to adjudicate. The "substantial showing" requirement of Subsection (c)(2) codified *Barefoot*'s holding that a certificate may issue only upon the applicant's substantial showing of the denial of a right, but it "substitut[ed] the word 'constitutional'" for the word "federal," *Slack* v. *McDaniel*, 529 U.S. 473, 483-484 (2000), thus ensuring that only prisoners with viable constitutional claims were entitled to appellate review of district court orders denying their habeas petitions.

Moreover, the issue-specification requirement in Subsection (c)(3) abrogated pre-AEDPA circuit court

precedent that denied district courts the authority to limit certificates to specific issues or otherwise circumscribe the issues that the court of appeals could consider once a certificate had been issued. See, *e.g.*, *Smith* v. *Chrans*, 836 F.2d 1076, 1079-1080 (7th Cir. 1988) (per curiam). Congress curtailed the court of appeals' exercise of such a broad adjudicatory authority by enacting Section 2253(c)(3). Ranking the issue-specification requirement as jurisdictional would give effect to Congress's purpose by requiring the courts of appeals to stay within the limits on their authority. Cf. *American Red Cross* v. *S.G.*, 505 U.S. 247, 263 (1992) (invoking "the canon of statutory construction requiring a change in language to be read, if possible, to have some effect").

B. The Practical Concerns Expressed By Petitioner Do Not Justify Treating Section 2253's Requirements As Nonjurisdictional.

1. Petitioner and his amici raise practical and equitable considerations that they say counsel against treating Sections 2253(c)(2) and (3) as jurisdictional. Echoing court of appeals decisions that treat as nonjurisdictional the substantial-showing and issue-specification requirements of Subsections (c)(2) and (3), amici (NACDL Br. 12) contend that jurisdictional status forces courts to "second-guess" COAs whose propriety is uncontested and thus "wastes judicial resources."

"Congress," however, "decides whether federal courts can hear cases at all, [and] it can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212-213. Congress has determined that judicial resources are best conserved—and finality interests best served—when habeas appeals are limited to cases where a petitioner can make a substantial showing of the denial of a constitu-

tional right. It would not accord with the habeas regime Congress established for a court of appeals to bypass this jurisdictional impediment and reach the merits of a purely procedural issue (or a statutory issue, or a state law issue for that matter), simply because the parties had already briefed it. *Kontrick*, 540 U.S. at 456 ("[A] court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct.").

Moreover, requiring courts and litigants to be mindful of jurisdictional requirements even after a judge has conducted a "substantial showing" analysis and issued a COA does not diminish the utility of that initial step. The certification process serves the important function of making sure that frivolous claims falling outside the courts of appeals' jurisdiction are not assigned to merits panels, thereby saving judicial resources. But that screening function does not relieve the litigants and the court from ensuring at every stage of the proceedings that the case was correctly certified as one that falls within the "class[] of cases," *Kontrick*, 540 U.S. at 454-455, that Congress authorized the court to hear. Indeed, the jurisdictional character of the substantial-showing and issue-specification requirements gives courts and parties an added incentive to pay close attention to those matters at the outset, in order to avoid the possible dismissal of an appeal later.

2. Petitioner (Br. 26-27 & n.6) and his amici (NACDL Br. 13-14) also suggest that it would be inequitable to penalize prisoners by dismissing habeas petitions based on errors made by a judge or court staff in preparing the COA itself. Petitioner's argument is based on the premise (Br. 15-20) that he in fact made a "substantial showing" of the denial of his Sixth Amendment right to a speedy trial and that the court of ap-

peals' failure to certify that issue was "an oversight in processing" his COA application. *Id.* at 12, 26.[5]

But if a prisoner has made the required showing that his constitutional rights have been violated, and the issuing judge overlooks it, the court of appeals can amend the COA to encompass review of that claim and clarify that the case actually belongs in the court of appeals. 28 U.S.C. 2253(c)(1). If, in contrast, a court of appeals mistakenly certifies a statutory or procedural issue in a case that does not also involve a debatable constitutional question, dismissing that case for lack of subject matter jurisdiction at some later point in the proceeding is not inequitable to the prisoner. His case does not fall within the "class[] of cases" that Congress has determined are "within [the court of appeals'] adjudicatory authority." *Kontrick*, 540 U.S. at 454-455. Congress's limitation of appellate review to cases that implicate constitutional rights, 28 U.S.C. 2253(c)(2), would be undermined if courts of appeals could review procedural or statutory issues merely because they (or the district courts) issued COAs certifying them.[6]

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[5] Here, petitioner briefed his speedy trial claim (along with several other constitutional claims) in the court of appeals, notwithstanding that none of those issues had been specifically identified in the COA. Pet. App. 3a n.1. The court had the opportunity to amend the COA, but instead it refused to address those issues, explaining that "[b]ecause COAs were not granted on these issues, we lack jurisdiction to consider the[m]." *Ibid.* That statement indicates that the court of appeals did not understand the COA to have implicitly included petitioner's speedy trial claim.

[6] Further reducing the likelihood that the COA requirements will be a trap for the unwary are the procedural rules governing habeas proceedings, which are designed to ensure both that a COA is properly issued before a petitioner may proceed with his appeal and that a habeas petitioner will have a fair opportunity to comply with this statutory

C. Because The COA Did Not Comply With The Requirements Of Section 2253(c), The Court Of Appeals Did Not Have Jurisdiction Over Petitioner's Appeal

1. The COA in this case did not comply with the requirements of Section 2253(c). It was limited to a procedural question involving the statute of limitations, J.A. 346-347, and it failed to identify any "specific issue * * * [that] satisf[ied] the showing required by paragraph (2)," namely, a substantial showing of the denial of a constitutional right. 28 U.S.C. 2253(c)(2)-(3). Because Section 2253(c) establishes a jurisdictional limitation, and because the COA here failed on its face to comply with the requirements set forth in that provision, the court of appeals lacked jurisdiction to resolve the purely

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requirement. Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." App., *infra*, 2a. If a COA is issued, it must be accompanied by statement of "the specific issue or issues that satisfy the showing required by 28 U.S.C. 2253(c)(2)." *Ibid.* If a COA is denied, the petitioner "may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." *Ibid.* Rule 11 also clarifies for the petitioner that "[a] timely notice of appeal must be filed even if the district court issues a certificate of appealability." *Ibid.*

Federal Rule of Appellate Procedure 22 further ensures that a COA has been properly issued by providing that if a habeas petitioner files a notice of appeal, "the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the [Habeas Rules] (if any), along with the notice of appeal and the file of the district court proceedings." App., *infra*, 3a. Rule 22 reiterates that "if the district judge has denied the certificate, the applicant may request a circuit judge to issue it," *ibid.*, and it maximizes the petitioner's opportunity to obtain a COA by stating that "[if] no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals," *id.* at 4a.

procedural question certified for review.[7] The Court should therefore vacate the judgment of the court of appeals for lack of appellate jurisdiction.

2. Petitioner notes (Br. 30) that the Justices of this Court have statutory authority to issue a COA under 28 U.S.C. 2253(c), and he contends that the Court "could issue a corrected certificate for petitioner if that were deemed necessary to facilitate resolution of the important questions raised by his case." It is correct that Justices of this Court are authorized to issue COAs. 28 U.S.C. 2253(c)(1) (stating that COAs may be issued by "a circuit justice or judge"). Even if a "circuit justice" were inclined to issue a COA, however, doing so would not give this Court authority to decide the procedural question that petitioner has presented for review.

a. As an initial matter, petitioner has not submitted an application for a COA in this Court. See 28 U.S.C. 2253(c)(2) (referring to necessary showing by "applicant" for issuance of a COA); Sup. Ct. R. 22 ("An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned."). Nor has any party sought review or modification of Judge Garza's order granting a COA limited to the procedural statute-of-limitations question. J.A. 346-347.

Furthermore, even if the argument made in petitioner's brief (Br. 30) were construed as an application for a COA, a circuit justice's issuance of a COA could not retroactively confer jurisdiction on the court of appeals

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[7] The parties debate (Pet. Br. 16-20; Resp. Br. 31-34) whether petitioner made a substantial showing of a violation of his Sixth Amendment speedy-trial right. The Court need not resolve that question if it agrees with the disposition proposed in the text, and the United States takes no position on the issue.

by issuing a COA. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992) ("[A] plaintiff cannot retroactively create jurisdiction based on post-complaint litigation conduct."). Section 2253(c)(1) states that unless a circuit judge issues a COA, "*an appeal may not be taken to the court of appeals*." (emphasis added). Even if a COA were now issued specifying a constitutional issue for review, the Court would not have jurisdiction to review the merits of the procedural issue that the court of appeals decided without jurisdiction. The judgment of the court of appeals should, in any scenario, be vacated.

b. Petitioner notes (Br. 30) that in *Slack*, after the Court concluded that a procedural issue could be resolved in a habeas appeal if a constitutional issue was also certified, the Court decided the procedural issue on the merits and remanded for a determination of whether the petitioner was "entitled to the issuance of a COA" based on the constitutional question. 529 U.S. at 473-474; see also *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 & n.3 (2009) (deciding that court of appeals, which denied a COA, had erred in concluding that the petition was time-barred without deciding whether petitioner was entitled to a COA). These cases do not, however, demonstrate that this Court has jurisdiction to resolve the procedural issue in this case. In *Slack* and *Jimenez*, the courts of appeals had refused to issue COAs, and this Court exercised its certiorari jurisdiction to review those orders. See *Hohn*, 524 U.S. at 257. In contrast, the court of appeals in this case decided petitioner's appeal on the merits, but based on a defective COA. This Court could not use its certiorari jurisdiction to review, on the merits, a procedural ruling that the court of appeals lacked jurisdiction to decide. Furthermore, al-

though the Court in *Slack* and *Jimenez* decided the relevant procedural issues on the merits instead of simply concluding that the petitioners had satisfied Section 2253(c)(2)'s "substantial showing requirement," that does mean that the Court should similarly decide the procedural question here. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1448 (2011).

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 2253 provides:

Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

2. The Rules Governing Section 2254 Cases in the United States District Courts provide in pertinent part:

* * * * *

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

* * * * *

3. The Federal Rules of Appellate Procedure provide in pertinent part:

* * * * *

Rule 22. Habeas Corpus and Section 2255 Proceedings

(a) **Application for the Original Writ.** An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) **Certificate of Appealability.**

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as

the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

* * * * *

AMICUS CURIAE BRIEF

No. 10-895

In the Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ, PETITIONER,

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE INNOCENCE NETWORK IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Interest of amici 1
Introduction and summary 2
I. Appellate jurisdiction under Section 2253(c) does not depend upon a COA's conformity with technical formalities 5
A. Although the issuance of a COA is "jurisdictional," the requirements for its issuance should be applied liberally, consistent with the critical role of habeas review in preventing unjust convictions 5
B. Appellate jurisdiction exists if, at any point, a judge or justice issues a COA after determining that the threshold requirements have been met; jurisdiction is not defeated by a defect in the COA's contents 9
1. In order for a COA to issue, it is only necessary that a single judge or justice find that the petition states a "debatable" constitutional question 10
2. A defect in the COA, such as a failure of the issuing judge to indicate the substantial constitutional issue, does not defeat appellate jurisdiction 12
3. Even if a defect in the COA were jurisdictional, it could be corrected by this Court 15
C. The inequitable consequences of deeming Section 2253(c)(3) jurisdictional are demonstrated in this case, where petitioner met the standard for obtaining a COA 16

1. It is at least debatable that the habeas petition states a valid claim for denial of a constitutional right 17
2. Whether the district court's procedural ruling was correct is also subject to debate among reasonable jurists, as demonstrated by the existing circuit conflict 19
II. Direct review of a state criminal conviction cannot conclude for purposes of 2244(d)(1)(a) before the highest court to review the case relinquishes jurisdiction by issuing a mandate or its equivalent 20
A. Under the plain text of Section 2244(d)(1), a state judgment is not "final" until *the later of* (1) the conclusion of direct review *or* (2) the expiration of the time for seeking such review 21
1. The court of appeals' holding relies on the absurd premise that there is no "conclusion" to a state direct appeal unless the defendant petitions for certiorari 22
2. The court of appeals erroneously focused the earlier, rather than later, of the finality triggers in Section 2244(d)(1)(a) 23
B. The "conclusion of direct review" cannot occur before the appellate court relinquishes authority through issuance of the mandate or its equivalent 27
C. Failure to defer to state rules to determine when direct review concludes would undermine Congress's goal of encouraging exhaustion of state remedies and create a trap for unsophisticated defendants 30

TABLE OF AUTHORITIES

Page(s)

CASES

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 11, 13

Banks v. *Dretke*, 540 U.S. 668 (2004) 15

Barefoot v. *Estelle*, 463 U.S. 880 (1983) 10

Barker v. *Wingo*, 407 U.S. 514 (1972) 18

Bell v. *Hood*, 327 U.S. 678 (1946) 11

Bowles v. *Russell*, 551 U.S. 205 (2007) 6

Calderon v. *Thompson*, 523 U.S. 538 (1998) 27, 28

Carey v. *Saffold*, 536 U.S. 214 (2002) 30

Charpentier v. *Ortco Contractors*, 480 F.3d 710 (5th Cir. 2007) 27

Clay v. *United States*, 537 U.S. 522 (2003) .. 25, 26, 28, 29

Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 22

Doggett v. *United States*, 505 U.S. 647 (1992) 17, 18

Dolan v. *United States*, 130 S. Ct. 2533 (2010) 14

Estelle v. *Gamble*, 429 U.S. 97 (1976) 8

Ex parte Johnson, 12 S.W.3d 472 (Tex. Crim. App. 2000) 20

Flagship Marine Servs., Inc. v. *Belcher Towing Co.*, 23 F.3d 341 (11th Cir. 1994) 27

Foxworth v. *St. Amand*, 929 N.E.2d 286 (Mass. 2010) 30

Gibbs v. *Burke*, 337 U.S. 773 (1949) 7

Gonzalez v. *State*, No. 05-05-01140-CR, 2006 WL 1900888 (Tex. Crim. App. July 12, 2006) 18

Graham County Soil & Water Conservation Dist. v. *United States ex rel. Wilson*, 545 U.S. 409 (2005) 32

Griggs v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982) 6

Haines v. *Kerner*, 404 U.S. 519 (1972) 8

Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011) 13

Hohn v. *United States*, 524 U.S. 236 (1998) 8, 9, 12

Holiday v. *Johnston*, 313 U.S. 342 (1941) 7

Holland v. *Florida*, 130 S. Ct. 2549 (2010) 2, 7, 33

Houston v. *Lack*, 487 U.S. 266 (1988) 6, 7, 14

Jimenez v. *Quarterman*, 555 U.S. 113 (2009) 25, 26, 28

Johnson v. State, 900 S.W.2d 940 (Ark. 1995) 30, 32

Johnson v. *United States*, 544 U.S. 295 (2005) 32

Lawrence v. *Florida*, 549 U.S. 327 (2007) 28

Miller-El v. *Cockrell*, 537 U.S. 322 (2003) 10, 11, 15

Panetti v. *Quarterman*, 551 U.S. 930 (2007) 8

Polk v. *State*, 789 N.W.2d 437 (Iowa Ct. App. 2010) 30

Riddle v. *Kemna*, 523 F.3d 850 (8th Cir. 2008) 19

Roberts v. *Cockrell*, 319 F.3d 690 (5th Cir. 2003) 22

Rowland v. *California Men's Colony*, 506 U.S. 194 (1993) 15

Siebert v. *State*, 778 So. 2d 842 (Ala. Crim. App. 1999) 30

Slack v. *McDaniel*, 529 U.S. 473 (2000) ..... *passim*

Smith v. *Barry*, 502 U.S. 244 (1992) 6

Soto v. *United States*, 185 F.3d 48 (2d Cir. 1999) 12

State v. *Hutcherson*, 847 So. 2d 378 (Ala. Crim. App. 2001) 30

Tennard v. *Dretke*, 542 U.S. 274 (2004) 15

Tinker v. *Moore*, 255 F.3d 1331 (11th Cir. 2001), cert. denied, 534 U.S. 1144 (2002) 19

Williams v. *Taylor*, 529 U.S. 420 (2000) 28

Wilson v. *Ozmint*, 357 F.3d 461 (4th Cir. 2004), cert. denied, 542 U.S. 923 (2004) 27

Yetman v. *Greer*, 483 S.E.2d 878 (Ga. Ct. App. 1997) 30

Young v. *United States*, 124 F.3d 794 (7th Cir. 1997), cert. denied, 524 U.S. 928 (1998) 12

STATUTES

28 U.S.C. 2244(d)(1) 20

28 U.S.C. 2244(d)(1)(A) ..... *passim*

28 U.S.C. 2244(d)(2) 31

28 U.S.C. 2253(c)(1) 11, 12, 15

28 U.S.C. 2253(c)(3) ..... *passim*

28 U.S.C. 2254(b)(1)(A) 31

28 U.S.C. 2254(c) 31

OTHER AUTHORITIES

3d Cir. R. 22.3 12

Chief Justice John Roberts, 2007 Year-End Report on the Federal Judiciary 23

Fed. R. App. P. 22 ..... 8, 24

Fed. R. App. P. 40 27

Fed. R. App. P. 41(b) 26, 27

Fed. R. App. P. 41(d)(2) 26

Tex. R. App. P. 18.1 20

Webster's Third New International Dictionary (1993) 14, 23

William J. Sabol et al., U.S. Dep't of Justice, Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2006 23

INTEREST OF AMICI[1]

Amici are the National Association of Criminal Defense Lawyers ("NACDL") and the Innocence Network ("the Network"). NACDL is a non-profit corporation with 10,000 members nationwide, joined by 90 state and local affiliate organizations totaling more than 40,000 private criminal defense attorneys, public defenders and law professors. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. NACDL has a keen interest in assuring that the Antiterrorism and Effective Death Penalty Act ("AEDPA") is applied in an even-handed and readily understood way.

The Network is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The Network's members represent hundreds of prisoners with innocence claims in all 50 states, the District of Columbia, and numerous foreign countries. In many cases, the Network has helped to establish prisoners' innocence through federal habeas petitions. The Network has a strong interest in ensuring that the application of AEDPA's procedural requirements does not frustrate the Great Writ's ability to vindicate the

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[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

rights of prisoners who may be actually innocent of the charges for which they were convicted.

INTRODUCTION AND SUMMARY

The writ of habeas corpus affords prisoners, including those convicted in state court, the critical opportunity to petition the federal courts to challenge the legality of their ongoing detention. When, in AEDPA, "Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010) (quoting *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000)). The important function that the Great Writ serves in ensuring the respect of constitutional rights in our judicial system, including vindicating the claims of the innocent, should inform the Court's resolution of each question presented.

1. The requirement that a certificate of appealability ("COA") be issued in AEDPA cases should not be applied in a technical manner. Nor should the Court treat as "jurisdictional" aspects of the COA that Congress has not designated as such.

As this Court's precedent regarding notices of appeal, which are also jurisdictional, makes clear, the jurisdictional nature of a COA does not mandate that rules regarding its content be applied in a strict or unforgiving fashion. The threshold requirements of a COA should be construed with special leniency because of the nature of habeas proceedings, in which most petitioners act *pro se*, and the danger that worthy constitutional claims would fail to obtain review if a formalistic standard were applied.

The requirement that a judge "indicate" in the COA the substantial constitutional question that is presented by the petition is not, itself, a jurisdictional requirement. The technical error (assuming it is error) of the judge or other court personnel who prepares the COA by failing to restate the debatable constitutional question does not vitiate the court's appellate jurisdiction. AEDPA does not make the language of the COA, which is issued by the court, jurisdictional, and this Court has often noted that jurisdiction over a party's appeal should not depend upon matters over which the party lacks control.

Even if the COA in this case were deficient, and even if that deficiency were of jurisdictional significance, this Court could cure that deficiency and proceed to address the merits of the procedural question on which the Court granted certiorari.

2. Section 2244(d)(1) triggers the one-year period of limitation for filing an application for a writ of habeas corpus on "the latest of" several events, including "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). Based on the plain text of Section 2244(d)(1)(A) and this Court's previous constructions of the statute, a judgment cannot become final until the *later of* "the conclusion of direct review" *or* "the expiration of the time for seeking such review."

The court of appeals' holding that petitioner's state conviction became "final" upon the expiration of time to seek discretionary review of the appellate court's decision, but before the state court of appeals issued its mandate, cannot be squared with the text of the sta-

tute. The court of appeals' view that a state conviction has a "conclusion" only if the defendant petitions this Court for a writ of certiorari is contrary to the plain meaning of the word "conclusion," which means "termination." Moreover, the court of appeals erred in treating the state conviction as becoming "final" on the *earlier* of the two triggers in Section 2244(d)(1)(A). The plain meaning of the statutory text makes clear that petitioner's time for filing a federal habeas petition could not begin to run before direct appellate review had concluded.

Direct review should be deemed to conclude when a state court issues its mandate or the equivalent. Only at that point is it clear that the state conviction is no longer subject to modification on direct review. This interpretation provides a uniform federal rule that is consistent with the principle of federalism underlying AEDPA and respects the state court's own announcement of its conclusion of direct review.

Beginning the one-year period of limitations before state-court review has concluded would, moreover, be inconsistent with Congress's purposes in AEDPA. Those purposes include encouraging a defendant to exhaust all available state court remedies. Yet, under the court of appeals' decision, the limitations clock could start running—and possibly even expire—before a defendant could even initiate state collateral proceedings.

The court of appeals' rule would create a trap for the unwary. State court defendants whose appeals are still pending before the state appellate courts have no reason to believe that their time for filing a federal habeas petition has started to run. AEDPA should not be

construed in so counter-intuitive a fashion, especially when its text does not fairly support such a reading.

I. APPELLATE JURISDICTION UNDER SECTION 2253(c) DOES NOT DEPEND UPON A COA'S CONFORMITY WITH TECHNICAL FORMALITIES

A. Although The Issuance Of A COA Is "Jurisdictional," The Requirements For Its Issuance Should Be Applied Liberally, Consistent With The Critical Role Of Habeas Review In Preventing Unjust Convictions

This Court's precedents make clear that a COA's "jurisdictional" character does not mandate that the statutory requirements be applied in a strict or demanding fashion. Even when a filing or other action is a prerequisite to a court's exercise of jurisdiction, it is often appropriate to take a functional, rather than highly formalistic, approach to determining whether the prerequisite has been satisfied. Liberal application of the requirements of a COA is particularly appropriate in light of the critical function that habeas review serves, and the fact that many applicants proceed *pro se*. Just as documents that fail to meet the formal criteria for a notice of appeal can nonetheless satisfy the jurisdictional requirement, a certificate of appealability that fails to conform to the technical requirements of Section 2253(c)(3) will nonetheless serve to confer appellate jurisdiction if the purposes of the statute have been met.

The Court's treatment of the requirements for filing a notice of appeal demonstrates that the requirements for the contents of a jurisdictional document may be applied in a liberal fashion. The timely filing of a no-

tice of appeal is, without question, an act of "jurisdictional significance." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam). The filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Id.* at 58; see also *Bowles* v. *Russell*, 551 U.S. 205, 209-211 (2007) ("[T]he taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'") (quoting *Griggs*, 459 U.S. at 61).

Despite the notice of appeal's jurisdictional nature, this Court has rejected a formalistic approach to determining whether the requirements for its contents have been met. Even where an appellant fails to comply with the technical specifications of a notice of appeal under Rule 3 of the Federal Rules of Appellate Procedure, for example, a court "may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Smith* v. *Barry*, 502 U.S. 244, 248 (1992) (quoting *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 316-317 (1988)). In *Smith*, this Court held that a *pro se* inmate's submission of an informal appellate brief could serve the function of a notice of appeal. *Id.* at 248-249. The Court explained that courts should "liberally construe" Rule 3's requirements for a notice of appeal. *Id.* at 248. As long as "the filing provides sufficient notice to other parties and the courts," it satisfies the Rule's purpose and should be deemed adequate. *Ibid.*

The Court has similarly applied a liberal construction to the "filing" requirement for notices of appeal where prisoners act *pro se*, as is often the case in habeas appeals. In *Houston* v. *Lack*, 487 U.S. 266 (1988), the Court deemed a *pro se* habeas petitioner's notice of

appeal to have been timely "filed" when he submitted the notice of appeal to prison authorities three days before expiration of the 30-day filing period. *Id.* at 270-271. The Court reasoned that the purposes of the time limitation were served by that liberal construction because "the moment at which *pro se* prisoners necessarily lose control over and contact with their notices of appeal is at delivery to prison authorities, not receipt by the clerk." *Id.* at 275. Accordingly, the Court found that the prisoner had properly complied with the jurisdictional requirement of a timely notice of appeal even though his notice was received by the clerk a day after the filing deadline. *Id.* at 276.

As the foregoing demonstrates, there is no call to apply the requirements for a COA in a strict or demanding way simply because a COA has jurisdictional significance. Liberal application of the COA requirements is particularly appropriate in light of the essential role that habeas review fulfills in the criminal justice system, as well as the *pro se* nature of many COA applications.

This Court has long recognized that "[m]eticulous insistence upon" compliance with procedural intricacies "is foreign to the purpose of habeas corpus," *Gibbs* v. *Burke*, 337 U.S. 773, 779 (1949), and, thus, "a petition for habeas corpus ought not to be scrutinized with technical nicety," *Holiday* v. *Johnston*, 313 U.S. 342, 350 (1941). And, subsequent to AEDPA's enactment, the Court has reaffirmed that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000); *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010) (quoting *Slack* and noting that habeas corpus is "the only writ explicitly protected by the Constitution"). In light

of the critically important function that habeas review serves in protecting those who have been convicted in violation of constitutional protections, including many who are innocent of the charges against them, the Court has emphasized that it would be inappropriate to interpret AEDPA to "close [the courts'] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Panetti* v. *Quarterman*, 551 U.S. 930, 946 (2007) (quoting *Castro* v. *United States*, 540 U.S. 375, 381 (2003)). These same concerns warrant applying a liberal standard to COA requirements, so as to avoid erecting a barrier to meritorious habeas claims that Congress has not itself created.

A more forgiving attitude is especially appropriate in light of the fact that many habeas petitions and COA applications—including those of petitioner Gonzalez in this case—are prepared by prisoners acting *pro se*. A "*pro se* document is to be liberally construed." *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976). Where, as is true of the majority of habeas petitioners, the prisoner prepares his application for a certificate of appealability without the assistance of counsel, this Court's decisions require that filings be evaluated under "less stringent standards than formal pleadings drafted by lawyers." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972).

Indeed, this Court's cases already reflect this more forgiving approach to the jurisdictional requirement of a COA. In *Slack*, for example, the Court held that it was appropriate to treat a notice of appeal "as an application for a COA," as provided in Rule 22 of the Federal Rules of Appellate Procedure. 529 U.S. at 483 (citing *Hohn* v. *United States*, 524 U.S. 236, 240 (1998)). In *Hohn*, moreover, the Court had similarly treated the

filing of a notice of appeal as an application for a certificate of appealability, even though Rule 22 did not by its own terms apply to the applicant's federal habeas proceedings. 524 U.S. at 240, 243-244.

B. Appellate Jurisdiction Exists If, At Any Point, A Judge Or Justice Issues A COA After Determining That The Threshold Requirements Have Been Met; Jurisdiction Is Not Defeated By A Defect In The COA's Contents

Consistent with Congress's purposes, this Court has construed AEDPA as establishing only a threshold requirement of a "debatable" constitutional question in order for a COA to issue. *Slack*, 529 U.S. at 484. That approach is also consistent with general principles that distinguish the court's jurisdiction to hear a case from the ultimate merits of the underlying claim, and is particularly appropriate where, as here, the district court's rulings precluded full development of the underlying constitutional claim.

Nothing in the text of Section 2253(c) suggests that the failure of a judge to restate the substantial constitutional issue presented by the petition vitiates the court's jurisdiction over the appeal. In light of the serious consequences of a requirement's "jurisdictional" character, the Court should hesitate to declare "jurisdictional" something that Congress has not clearly identified as such. It would be particularly inappropriate to deem a "jurisdictional" requirement something over which the applicant has no control, such as the COA drafter's compliance with technical rules. In the habeas context in particular, the Court has made clear that a prisoner's appellate rights cannot be de-

feated by the "procedural error" of a judge. *Id.* at 483. Moreover, even if "jurisdictional," any defect in the COA's form is subject to later correction, including by this Court.

1. ***In order for a COA to issue, it is only necessary that a single judge or Justice find that the petition states a "debatable" constitutional question***

This Court's precedent clearly distinguishes between the jurisdiction of a court to consider a claim and the ultimate merits of the underlying claim. As the Court has explained, "a COA determination is a separate proceeding, one distinct from the underlying merits." *Miller-El* v. *Cockrell*, 537 U.S. 322, 342 (2003). Because the COA serves only as an initial screening filter, the Court repeatedly stressed that the "substantial showing" requirement does not involve a determination of the petition's ultimate merits, but only whether the question is one "that reasonable jurists could debate" or that is "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (quoting *Barefoot* v. *Estelle*, 463 U.S. 880, 893 & n. 4 (1983)). See *Barefoot*, 463 U.S. at 893 n.4 (stressing that to make a "substantial showing," "obviously the petitioner need not show that he should prevail on the merits") (quoting *Gordon* v. *Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980)). Indeed, the Court has stressed that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338.

In other contexts, the Court has stressed the distinction between jurisdiction to hear a claim, and the

claim's ultimate success on the merits. To invoke the courts' federal question jurisdiction, for example, it is enough that the complaint "pleads a *colorable claim* 'arising under' the Constitution or laws of the United States." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 (2006) (emphasis added). See *Bell* v. *Hood*, 327 U.S. 678, 682 (1946) ("[T]he failure to state a proper cause of action calls for a judgment on the merits, and not for a dismissal for want of jurisdiction."). Likewise, under AEDPA, the threshold inquiry "does not require full consideration of the factual or legal bases adduced in support of the claims," which can occur only in *exercise* of the court's jurisdiction, but instead asks only whether the district court's resolution of petitioner's constitutional claims "was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

Imposing an exacting standard of review to evaluate the underlying merits of a claim would be particularly inappropriate where, as here, the district court's dismissal of the petition on threshold grounds has sharply limited the prisoner's ability to develop the claim fully. To fault a prisoner for the relatively undeveloped nature of his constitutional claim in such circumstances would impermissibly "allow trial court procedural error" to frustrate the prisoner's ability to vindicate his constitutional rights. *Slack*, 529 U.S. at 483.

The relatively low standard for issuing a COA is further reflected in the fact that Congress has provided that this threshold requirement is satisfied as long as any single judge or Justice determines that the standard is met. The text of AEDPA uses the singular, stating that a COA can be issued by a "circuit justice or judge." 28 U.S.C. 2253(c)(1). As this Court has confirmed, Congress's conspicuous use of the singular form

means that an individual judge or Justice can issue a COA of behalf of the members of the court on which he or she sits. See *Hohn*, 524 at 241-242. Indeed, at least one court of appeals has institutionalized this rule by expressly providing that as long as "*any* judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue." 8d Cir. R. 22.3 (emphasis added). In light of the low threshold standard, requiring only that a reasonable jurist would find the constitutional issue "debatable," it wastes judicial resources for the court to debate a single judge's decision to issue a COA, rather than simply proceed to the merits of the appeal. See *Young* v. *United States*, 124 F.3d 794, 799 (7th Cir. 1997), cert. denied, 524 U.S. 928 (1998). Requiring an appellate court to second-guess the issuance of a COA would thwart the interest in conserving judicial resources by forcing the court of appeals to serve "as a gate keeper for the gate keeper." *Soto* v. *United States*, 185 F.3d 48, 52 (2d Cir. 1999).

2. ***A defect in the COA, such as a failure of the issuing judge to indicate the substantial constitutional issue, does not defeat appellate jurisdiction***

In contrast to the jurisdictional requirement that a judge or Justice issue a COA, without which "an appeal may not be taken to the court of appeals," 28 U.S.C. 2253(c)(1), nothing in the text of Section 2253(c)(3) suggests that the issuing judge's failure to specify the issues as to which the applicant has made a "substantial showing" is a matter of jurisdictional significance. To the contrary, both the text and structure of Section 2253, as well as general principles distinguishing jurisdictional limitations from claims-processing rules, point

to the conclusion that an error by the issuing judge does not defeat the courts' appellate jurisdiction.

Because of the significant consequences of designating a requirement as "jurisdictional," see, *e.g.*, *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011), this Court has cautioned that, unless Congress "clearly states" a statutory limitation in jurisdictional terms, it should not be treated as such, *Arbaugh*, 546 U.S. at 515. See *id.* at 516 ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."); *Henderson*, 131 S. Ct. at 1204-1205 (holding that statute providing 120-day deadline for filing notice of appeal of decision of Board of Veterans' Appeals is non-jurisdictional because it failed to include mandatory language defining deadlines for permissible judicial review).

In sharp contrast to the language of paragraph (1), the text of Section 2253(c)(3) imposes no conditions on a court's power to hear an appeal. The latter provision states only that a "certificate of appealability * * * shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." 28 U.S.C. 2253(c)(3). This requirement, directed at the issuing judge, is in the nature of a claims-processing rule that assists parties and the court of appeals in focusing the appeal. Even a COA that does not fully comply with subsection (c)(3), in other words, is still a "certificate" within the meaning of subsection (c)(1), and thus confers jurisdiction.

Absent a clear expression to the contrary, Congress should not be presumed to have conditioned jurisdiction to review the denial of a habeas petition on

matters outside the control of petitioner himself, such as the inadvertence of a single judge. As a general matter, limits on appellate jurisdiction are construed so that they do not depend on the conduct of third parties over which the appellant has a "lack of control." See *Houston*, 487 U.S. at 273 (explaining that the "filing" of a notice of appeal is deemed to occur when the appellant lacks control over further delay). Where treating a requirement as jurisdictional would harm one "who likely bear[s] no responsibility for the" error, that "provides a strong indication that Congress did not intend" the requirement to be jurisdictional. *Dolan* v. *United States*, 130 S. Ct. 2533, 2535-2536 (2010). More particularly, in the habeas context, the Court has observed that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights," and that Congress has "expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal." *Slack*, 529 U.S. at 483. Likewise, nothing in Section 2253(c) suggests that the court of appeals' jurisdiction over the appeal from denial of a habeas petition can be defeated by the procedural error of the judge who issues the COA.

Congress's use of the relatively vague term "indicate" in paragraph (3) further suggests that the requirement is not of jurisdictional significance. To "indicate" something is "to point out or point to or toward with more or less exactness." Webster's Third New International Dictionary 1150 (1993). The COA may "indicate" the substantial constitutional issue with greater or lesser degrees of specificity or by reference to another document, such as the application or the opinion below. Indeed, where the petition raises only a single constitutional issue, the COA implicitly "indi-

cates" the substantial nature of that constitutional issue merely by the fact of the COA's issuance. Cf. *Rowland* v. *California Men's Colony*, 506 U.S. 194, 200-201 (1993) (commenting that Congress's use of "indicates" reflects that the standard is to be applied "with something less than syllogistic force").

3. ***Even if a defect in the COA were jurisdictional, it could be corrected by this Court***

Even if the failure of the issuing judge sufficiently to identify a substantial constitutional question in the COA were a jurisdictional defect, it would be subject to correction by this Court. To hold otherwise would have the paradoxical consequence of putting prisoners whose applications for COAs were initially rejected in a better position than those who were initially granted COAs.

Under Section 2253(c)(1), if the court of appeals erroneously denies issuance of a COA, this Court, or a Justice thereof, can subsequently grant one, thereby certifying appellate jurisdiction over the habeas petitioner's appeal. See 28 U.S.C. 2253(c)(1). In numerous cases, this Court has reviewed and reversed the court of appeals' denial of a COA. See, *e.g.*, *Tennard* v. *Dretke*, 542 U.S. 274, 288-289 (2004) (finding that petitioner was entitled to COA and remanding for consideration of claim challenging state sentencing scheme); *Banks* v. *Dretke*, 540 U.S. 668, 703-705 (2004) (remanding following finding that COA should have issued for petitioner's *Brady* claim); *Miller-El*, 537 U.S. at 348 (granting COA and remanding for consideration of equal protection claims). If the circuit court's initial erroneous denial of a COA does not permanently divest the courts of appellate jurisdiction, then a technical de-

fect in the *granting* of a COA is likewise subject to later correction.

Where the court of appeals has not yet considered the merits of the appeal because the application for a COA was improperly rejected, this Court's practice is to correct the erroneous denial of a COA and remand to the court of appeals to address the underlying merits of the appeal in the first instance. Here, by contrast, the court of appeals has already ruled on the merits of petitioner's appeal after granting the purportedly defective COA. If this Court concludes that the COA was insufficient for failure to identify the substantial constitutional issue, the appropriate course is to correct the COA and proceed to address the underlying merits of the district court's procedural ruling.

C. The Inequitable Consequences Of Deeming Section 2253(c)(3) Jurisdictional Are Demonstrated In This Case, Where Petitioner Met The Standard For Obtaining A COA

In *Slack*, the Court held that, when a habeas petition has been dismissed on procedural grounds, a COA should issue where (i) jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (ii) jurists of reason would find it debatable whether the district court was correct in its procedural ruling. 529 U.S. at 484. Petitioner has satisfied this standard by alleging facts that raise at the very least the prospect of a debatable constitutional claim for denial of a speedy trial. Additionally, the district court's procedural ruling is clearly debatable, as evidenced by the disagreement it has engendered among the courts of appeal.

1. ***It is at least debatable that the habeas petition states a valid claim for denial of a constitutional right***

Petitioner's underlying claim centers on an alleged violation of his speedy trial rights. In assessing a speedy trial claim under the Sixth Amendment, this Court balances four factors: (1) the length of the delay; (2) the reason for the delay; (3) the petitioner's assertion of his right to a speedy trial; and (4) purported prejudice to the petitioner. See *Doggett* v. *United States*, 505 U.S. 647, 651 (1992) (citing *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972)). Here, where the district court's procedural ruling denied petitioner the opportunity to further develop his claim, petitioner has made a sufficient showing as to each factor.

As to the first factor, this Court has held that an "extraordinary 8 ½ year lag" between indictment and arrest "clearly suffices" to signal a potential violation of the defendant's speedy trial rights. *Doggett*, 505 U.S. at 652. Here, petitioner states that he was initially indicted for murder on June 12, 1995. Pet. for Habeas Corpus, No. 3:08-cv-151-D, at 7 (N.D. Tex. Jan. 31, 2008); Pet'r's *Pro Se* Pet. for COA at 3. The state waited more than ten years before bringing petitioner to trial, *ibid.*, longer even than the delay at issue in *Doggett*.

Second, the petition at least raises concerns about the diligence of the police investigator's search for petitioner when he was in Guatemala. Petitioner notes that the investigator assigned to his case had actual knowledge of his whereabouts during the period of delay, including the specific village in Guatemala where he lived. Pet'r's *Pro Se* Pet. for COA at 5, 6. Jurists of

reason could conclude that the extent of the state's knowledge and failure to timely investigate gives rise to reasonable debate regarding the ten-year delay's effect on petitioner's constitutional rights. See *Doggett*, 505 U.S. at 652-653.

Third, it is at least debatable that petitioner asserted his speedy trial rights in a timely fashion. This Court has noted that a petitioner who has knowledge of his indictment but fails to raise his speedy trial rights cannot later claim the protection. See *id.* at 653. However, petitioner states that he had no knowledge of his 2001 indictment and claimed a violation of his speedy trial rights in a timely manner. See Pet'r's *Pro Se* Pet. for COA at 7, 11. Whether to penalize petitioner for failing to move to dismiss the indictment in Texas while petitioner was in Guatemala, and before he was provided counsel, presents, at the very least, a debatable question.

Finally, reasonable judges at least could debate whether respondent was prejudiced by the delay. The case against petitioner relied exclusively on eyewitness testimony. See *Gonzalez* v. *State*, No. 05-05-01140-CR, 2006 WL 1900888 at *1 (Tex. Crim. App. July 12, 2006) (noting the testimony of two eyewitnesses in identifying petitioner as the victim's assailant). In light of the recognized failings of memory with the passage of time, the prosecution's heavy reliance on witness testimony rather than forensic evidence in convicting petitioner raises a substantial question whether the delay in petitioner's trial prejudiced his defense. See *Barker*, 407 U.S. at 532 (noting prejudice a petitioner faces due to the potential for disappearance of witnesses and imperfect recollections with the passage of time).

As the foregoing demonstrates, petitioner's constitutional claim is at the very least one that reasonable jurists could debate, and therefore "substantial" within the meaning of 28 U.S.C. 2253(c)(2).

2. ***Whether the district court's procedural ruling was correct is also subject to debate among reasonable jurists, as demonstrated by the existing circuit conflict***

The procedural issue in the present case is clearly one on which reasonable jurists can disagree. In fact, at least two courts of appeals would have held petitioner's habeas petition to be timely under Section 2244(d)(1)(A) because the issuance of the state court's mandate—if later than the expiration of the time for seeking further review—marks the conclusion of the direct review process and thus serves as the touchstone for finality of the state court's judgment. See *Riddle* v. *Kemna*, 523 F.3d 850, 856 (8th Cir. 2008); *Tinker* v. *Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001), cert. denied, 534 U.S. 1144 (2002). For these reasons, petitioner has presented evidence to show that reasonable jurists would debate the accuracy of the district court's ruling that Gonzalez's petition was time-barred.

II. Direct Review Of A State Criminal Conviction Cannot Conclude For Purposes Of 2244(d)(1)(A) Before The Highest Court To Review The Case Relinquishes Jurisdiction By Issuing A Mandate Or Its Equivalent

In AEDPA, Congress expressly allowed a state prisoner a full year within which to file a petition for a writ of habeas corpus, beginning on the "latest of" separately enumerated potentially triggering events. 28 U.S.C. 2244(d)(1). Among the possible triggering events, subparagraph (A) identifies "the date on which the judgment became final" and then states two different ways such finality can occur: "by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). In this case, petitioner filed his habeas petition within one year of the "conclusion of direct review," which occurred when the state intermediate court of appeals issued its mandate relinquishing control over the appeal from petitioner's conviction. See Tex. R. App. P. 18.1; *Ex parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000). Because, under the plain language of Section 2244(d)(1)(A), a state criminal conviction does not become "final" before direct review has reached its "conclusion," petitioner's filing was timely.[2]

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[2] Because the habeas petition was timely under the first prong of Section 2244(d)(1)(A), the Court need not reach petitioner's additional argument that the petition was also timely under the second prong of Section 2244(d)(1)(A) because it was brought within a year of the expiration of petitioner's time to seek certiorari review in this Court from his state conviction. See Pet. Br. 51-57. As long as petitioner's filing was timely under *either* prong, that is sufficient to satisfy Section 2244(d)(1).

The lower courts rejected this straight-forward application of the statutory text in a misguided pursuit of narrow uniformity in AEDPA's application. While Congress has supplied a uniform federal rule for determining the timeliness of state habeas petitions, that rule requires reference to state procedures to determine when the federally identified triggers occurred. A failure to take account of the realities of state proceedings would be inconsistent with Congress's intent to encourage exhaustion of state collateral relief before pursuing federal habeas review. Even if strict uniformity were achievable, and desirable, that would provide no basis to disregard the statutory text. Congress has expressly provided that the one-year period for filing a federal habeas petition does not begin to run until "the latest" of the specified dates. A state conviction does not become "final" under Section 2244(d)(1)(A) as long as direct appellate review has not reached its "conclusion" or the time to seek further review has not yet expired, whichever is later. In either event, the state conviction is still subject to revision, and federal habeas review is premature.

A. Under The Plain Text of Section 2244(d)(1), A State Judgment Is Not "Final" Until *The Later Of* (1) The Conclusion Of Direct Review *Or* (2) The Expiration Of The Time For Seeking Such Review

In Section 2244(d)(1), Congress specified that the beginning of the one-year period of limitation is determined by "the latest of" the specified points in time, including "the date on which the judgment became final by [(i)] the conclusion of direct review or [(ii)] the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). Here, the court of appeals held that the

time limitation began running upon the expiration of time for seeking review, which was *earlier than* the conclusion of direct review. Because that holding is contrary to Congress's express textual direction that the statutory period start running after "the latest of" the possible triggers, this Court's analysis need not proceed any further, and the judgment of the court of appeals must be reversed. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("When the words of a statute are unambiguous, then, this first canon" of construction, that Congress means what it says in a statute, "is also the last: judicial inquiry is complete").

1. *The court of appeals' holding relies on the absurd premise that there is no "conclusion" to a state direct appeal unless the defendant petitions for certiorari*

The court of appeals' analysis effectively reads one of the two prongs of Section 2244(d)(1)(A) out of the statute in all but a small percentage of cases. The court of appeals first defined the phrase "the conclusion of direct review" to mean "when the Supreme Court either rejects the petition for certiorari or rules on its merits." *Roberts* v. *Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). The court reasoned that when a defendant does not pursue his appeal through to a petition for certiorari, then "the conviction does not become final by the conclusion of direct review" and can only "become[] final by 'the expiration of the time for seeking such review.'" *Ibid.*; see *ibid.* (if a defendant does not exhaust state appeals, "the conviction becomes final when the time for seeking further direct review in the state court expires"). In other words, the court of appeals concludes that, except for the small minority of state crim-

inal cases in which a petition for certiorari is filed, the first prong of Section 2244(d)(1)(A) is irrelevant. William J. Sabol *et al.*, U.S. Dep't of Justice, Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2006, at 3, http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf (676,952 state prisoners admitted in 2005); Chief Justice John Roberts, 2007 Year-End Report on the Federal Judiciary, at 9, http://www.supremecourt.gov/publicinfo/year-end/2007 year-endreport.pdf (8,857 cases filed in the Supreme Court in the 2006 Term). But there is no textual basis for the court of appeals' holding that "the conclusion of direct review" can *only* mean a ruling—either on the merits or denying a petition for certiorari—by this Court.

Under any ordinary meaning of the words, there must be a "conclusion of direct review" in *every* case in which a state defendant takes an appeal. The word "conclusion" is defined to mean the "close, termination, [or] end" of something. See Webster's Third New International Dictionary 471 (1993). Every case in which a state criminal defendant takes an appeal must have a "close, termination, [or] end," even if the appeal is not pursued through to a petition for certiorari. The court of appeals' reasoning, which depends on the premise that a criminal appeal that stops short of a petition for certiorari does not have a "conclusion" simply cannot be squared with the plain meaning of the text Congress enacted.

2. *The court of appeals erroneously focused the earlier, rather than later, of the finality triggers in Section 2244(d)(1)(A)*

The court of appeals disregarded the "conclusion of direct review" prong because it was looking to deter-

mine the *earlier* of the two triggers under Section 2244(d)(1)(A), rather than the later of them. The court reasoned, for example, that "the limitations period *can begin* on 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review'" and that, for defendants "who do not exhaust their state court rights, the 'expiration of the time for seeking [direct] review' is clearly when the petitioner can no longer timely file for further state court review, not when the mandate issues." Pet. App. 6a (emphasis added). Because the court of appeals was trying to determine the earliest date on which "the limitations period can begin" under sub-paragraph (A), the court deemed it irrelevant that the first prong of that sub-paragraph was not satisfied until a later date than the expiration of time to seek discretionary review in the state's highest court.

Contrary to the court of appeals' approach, Congress specified that the limitations period would not begin until the "latest of" the potential triggers identified in Section 2244(d)(1). Even within sub-paragraph (A) Congress indicated that it was the later of the two prongs that would govern. The triggering date under sub-paragraph (A) is when the state court "judgment became final by" the first "or" second prong. Given that the prongs are different ways in which a proceeding might become "final," it is only reasonable that the later of the two possibilities should govern when they diverge. The structure of the provision, along with the plain meaning of the terms, makes clear that Congress did not regard a state court judgment as "final" as long as *either* direct review had not reached its "conclusion" *or* the time for seeking further review had not yet run.

The court of appeals' approach of applying the earliest date on which the limitations period "can begin" to run cannot be squared with Congress's expressed intent to ensure that direct review was truly and surely completed before starting the one-year clock running. As this Court made clear in *Jimenez* v. *Quarterman*, 555 U.S. 113 (2009), the finality required under Section 2244(d)(1)(A) cannot exist when the conviction is still "capable of modification" on direct review. *Id.* at 120. In *Jimenez*, the Court determined that, once the state courts had reopened the defendant's direct appeal from his conviction, the conviction was no longer "final" for purposes of Section 2244(d)(1)(A). *Id.* at 119-120. Although the deadline to seek further appellate review from his initial direct appeal had passed years earlier, the Court reasoned that "direct review cannot conclude for purposes of § 2244(d)(1)(A) until the availability of direct appeal to the state courts and to this Court has been exhausted." *Id.* at 117, 119 (internal citations omitted). In other words, the Court recognized that "conclusion of direct review" prong prevents a state conviction from becoming final until "the process of direct review" has "come to an end," and the state conviction is no longer "capable of modification" on direct appeal. *Id.* at 119-120 (quotation marks omitted).

The Court's decision in *Clay* v. *United States*, 537 U.S. 522 (2003), also makes clear the Court's understanding that Section 2244(d)(1)(A) is triggered by the *later* of its two finality formulations. In *Clay*, the Court analyzed Section 2244(d)(1)(A) in the course of construing the one-year limitations period in 28 U.S.C. 2255(f)(1) for seeking federal habeas review. The Court rejected an argument that a federal "conviction becomes final" for purposes of Section 2255(f)(1) when the

court of appeals' mandate issued, but did so in a context where the mandate had issued *before* the time for filing a petition for certiorari had expired. *Id.* at 525. The Court noted that the proposed rule would hold "the § 2255 petitioner to a tighter time constraint than the petitioner governed by § 2244(d)(1)(A)," and ruled instead that the clock started at the expiration of the time for filing a petition for certiorari with this Court, which was the later of the two dates. *Id.* at 529-530.[3] In the process of so holding, the Court explained that the argument, made by the Court-appointed amicus—that a conviction is "final" when the mandate issues, though the time to seek certiorari has not yet expired---would be "a stronger argument if" Section 2255 had "explicitly incorporated the first of § 2244(d)(1)(A)'s finality formulations *but not the second.*" *Id.* at 529 (emphasis added). In other words, the Court recognized that, if Section 2255 had incorporated both of "the two finality triggers set forth in § 2244(d)(1)(A)," a federal conviction would become final only after the later of the two had transpired. *Ibid.* Implicitly, therefore, the Court rejected in *Clay* the court of appeals' view that the one-year period "can begin" to run upon the earlier of the two triggers in Section 2244(d)(1)(A).

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[3] In the federal system, the court of appeals' mandate will generally issue before the expiration of the period within which to file a petition for certiorari. See Fed. R. App. P. 41(b). If the mandate is stayed pending a petition for certiorari, the rule ties the length of the stay to the Supreme Court's process, specifying that the stay "must not exceed 90 days" without good cause and, if a petition for certiorari is filed, the mandate must issue "immediately" upon the petition being denied or, if it is granted, upon "the Supreme Court's final disposition." *Id.* at 41(d)(2).

B. The "Conclusion Of Direct Review" Cannot Occur Before The Appellate Court Relinquishes Authority Through Issuance Of The Mandate Or Its Equivalent

"[T]he process of direct review" does not reach its conclusion until the state conviction is no longer "capable of modification" on direct appeal. *Jimenez*, 555 U.S. at 119-120 (quotation marks omitted). Because an appellate court retains authority to review and modify the judgment until the court has issued its mandate or similar act that returns jurisdiction to the district court, the "conclusion of direct review" cannot occur before the court of appeals' mandate has issued.

The issuance of a mandate is well recognized as marking the conclusion of appellate review. In the federal system, there is broad agreement that an appellate court retains authority to revise its judgment until it relinquishes its jurisdiction by issuing its mandate. See, *e.g.*, *Charpentier* v. *Orteo Contractors*, 480 F.3d 710, 713 (5th Cir. 2007); *Wilson* v. *Ozmint*, 357 F.3d 461, 464 (4th Cir. 2004), cert. denied, 542 U.S. 923 (2004); *Flagship Marine Servs., Inc.* v. *Belcher Towing Co.*, 23 F.3d 341, 342 (11th Cir. 1994). Indeed, the Federal Rules of Appellate Procedure expressly provide that the mandate will not generally issue until a week *after* the time for filing a petition for rehearing, in recognition of the fact that, until the mandate issues, the court of appeals' judgment is subject to modification. See Fed. R. App. P. 40, 41(b).

By contrast, after the appellate court has issued its mandate, the court of appeals may no longer freely modify the judgment. Because the mandate transfers authority back to the district court and ends the appel-

late court's review, parties have an acknowledged "profound interest[] in repose attaching to the mandate of a court of appeals." *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998) (quotation marks omitted). Thus, while the court of appeals has the power to recall the mandate, the circumstances in which it can do so are greatly circumscribed. *Ibid.*[*]

This Court has frequently focused on the issuance of a court's mandate as an indication of finality, specifically in the context of AEDPA's one-year statute of limitations. In *Clay*, for example, the Court observed that the court-appointed amicus would have had "a stronger argument" that a judgment becomes final at the issuance of the mandate if the text of Section 2255 had read simply "becomes final *by the conclusion of direct review*." 537 U.S. at 529. And in the context of AEDPA's tolling provision, the Court found in *Lawrence* v. *Florida*, 549 U.S. 327 (2007), that the issuance of a mandate by the state's highest court marked the conclusion of the state's review of the defendant's application for post-conviction relief: "After the State's highest court has issued its mandate or denied review, no other state avenues for relief remain open." *Id.* at 332. The Court identified the issuance of the mandate or denial of review as the point at which "the state court's postconviction review is complete." *Ibid.*

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[*] The mere "possibility that a state court may reopen direct review" by recalling its mandate "'does not render convictions and sentences that are no longer subject to direct review nonfinal'" for purposes of Section 2244(d)(1)(A). *Jimenez*, 555 U.S. at 120 n.4 (quoting *Beard* v. *Banks*, 542 U.S. 406, 412 (2004)).

Deference to state-court rules about when the appellate court is divested of jurisdiction to modify the judgment is also consistent with Congress's purposes in enacting AEDPA. In enacting AEDPA, Congress sought "to further the principles of comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). While Section 2244(d)(1)(A) establishes a uniform federal rule for determining finality, *Clay*, 537 U.S. at 530-531, that rule, consistent with Congress's other purposes, requires in its application that the federal courts consult state procedures. Construing the phrase "the conclusion of direct review" to mean the issuance of the state court's mandate fulfills these congressional objectives.

By specifying that the statutory period begins to run only on the "latest of" the identified events, including the later of the "conclusion" of the direct appeal or the expiration of time to seek further appeal, Congress has ensured federal uniformity. A state may not, for example, start the statutory period under Section 2244(d)(1) before the expiration of time for seeking certiorari by specifying an earlier event as the point when the state judgment becomes "final." See *Clay*, 537 U.S. at 530-531 (by defining "the date on which the judgment became final" Congress ensured that finality assessments are not made "by reference to state-law rules that may differ from the general federal rule and vary from State to State"). Reference to state procedures is, however, unavoidable in assessing the various finality triggers in a given case. For example, even under the court of appeals' rule, the federal court must consult state law to determine when the time for seeking discretionary state review expired if the defendant

did not exhaust his state appellate avenues. See Pet. App. 6a.

Specifying that state direct review does not conclude before the appellate court has issued its mandate or taken similar action to transfer the case back to the trial court would provide even greater uniformity and clarity. Although terminology and details vary, each state specifies a procedural point at which the appellate court relinquishes its jurisdiction over the judgment, and thus the issuance of the mandate provides a uniform time to determine "the conclusion of direct review" while still respecting state procedures. [5]

C. Failure To Defer To State Rules To Determine When Direct Review Concludes Would Undermine Congress's Goal Of Encouraging Exhaustion of State Remedies And Create A Trap For Unsophisticated Defendants

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[5] See, *e.g.*, Pet. Br. 47 (collecting cases and statutes from 27 states that define finality by issuance of the mandate or its equivalent). Some states call this event the mandate, whereas others use different terminology. See, *e.g.*, *Siebert* v. *State*, 778 So. 2d 842, 848-849 (Ala. Crim. App. 1999), disapproved of on other grounds by *State* v. *Hutcherson*, 847 So. 2d 878 (Ala. Crim. App. 2001) ("certificate of judgment"); *Johnson* v. *State*, 900 S.W.2d 940, 951 (Ark. 1996) ("mandate"); *Yetman* v. *Greer*, 483 S.E.2d 878, 881 (Ga. Ct. App. 1997) ("remittitur"); *Polk* v. *State*, 789 N.W.2d 437 (Iowa Ct. App. 2010) (unpublished table decision) ("procedendo"); *Foxworth* v. *St. Amand*, 929 N.E.2d 286, 291 (Mass. 2010) ("rescript"). It is the functional reality, rather than state terminology, that marks when direct review has concluded. See *Carey* v. *Saffold*, 536 U.S. 214, 223 (2002) ("Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears.").

Although the Court need look no further than the statutory text to resolve the question presented in petitioner's favor, the policies behind AEDPA also counsel in favor of finding that the "conclusion of direct review" of a state conviction does not occur before direct review has, in fact, terminated. AEDPA reflects a careful congressional balance between many competing goals. One of those goals is to encourage state court defendants to exhaust state remedies, often including state post-conviction review. The court of appeals' rule would frustrate that purpose by making the time to file a federal habeas petition begin before the defendant could even initiate state collateral proceedings. In so doing, the court of appeals' rule would create a trap for many *pro se* prisoners who must already navigate a confusing maze of procedural rules in order to seek relief in federal court.

In Section 2254(b)(1), Congress has specifically provided that relief cannot be granted to a state habeas petitioner unless he has "exhausted the remedies available in the courts of the State," which includes "any available procedure" for raising the question presented. 28 U.S.C. 2254(b)(1)(A), (c). In order to permit exhaustion of state remedies *before* filing a federal habeas petition, Congress provided that the time during which a state post-conviction or other collateral proceeding is pending does not count toward the one-year limitations period for the federal application. 28 U.S.C. 2244(d)(2).

The court of appeals' rule undermines the careful balance that Congress sought to strike. In many states, as petitioner has noted, a defendant cannot initiate collateral review proceedings until his conviction has become "final" on direct appeal. Pet. Br. 43 n.12 (identifying 16 states in which a defendant may not pursue state

post-conviction remedies until the conviction is "final" as defined by state law). Because most states define finality on direct review for this purpose by the issuance of the mandate or its equivalent, the court of appeals' rule would mean that the one-year period for filing a federal habeas petition would start to run for many defendants before they could even start the often-necessary process of exhausting state collateral remedies. Indeed, that was true in this very case, because in Texas, a court "does not have jurisdiction to consider an application for writ of habeas corpus pursuant to Art. 11.07 until the felony judgment from which relief is sought becomes final." *Johnson*, 12 S.W.3d at 473.

In the most extreme case, it is even possible that, under the court of appeals' rule the time for filing a federal habeas petition would *expire* before the state appeals process concludes or the state defendant could even initiate the prerequisite state collateral proceedings. A state appellate court might, for example, grant rehearing *sua sponte* after the time for seeking discretionary appeal to a higher state court has expired, but fail to issue an amended decision for over a year, while the court waits for a ruling by this Court on a controlling issue of law. It is, as this Court has made clear, "highly doubtful" that Congress intended a time limit on pursuing a habeas claim to "begin to run (and may[be] even expire) before the [habeas] claim and its necessary predicate even exist." *Johnson* v. *United States*, 544 U.S. 295, 305 (2005); *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (citing same). Yet, the court of appeals' rule would have precisely that bizarre result.

Finally, and most disturbingly, the court of appeals' rule would create a trap for unsophisticated defendants, including those who are innocent of the crimes with which they were charged. A defendant whose direct state appeal is still pending because the appellate court has withheld the mandate in order to further review the judgment has no reason to believe that his time for seeking federal habeas review is already running. He is likely to believe that, because his direct appeal has not yet concluded and there is as yet no opportunity to file state collateral proceedings, the time for seeking federal habeas has not yet started to run either. Nothing in AEDPA suggests that Congress intended to create such a trap that might preclude federal habeas review.

As the Court has recently observed, Congress did not in AEDPA pursue the objective of eliminating delay "at all costs" or "los[e] sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010) (quoting *Slack*, 529 U. S. at 483). The court of appeals' ruling subverts the balance Congress sought to achieve.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AUGUST 2011

AMICUS CURIAE BRIEF

No. 10-895

In The
Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ,
Petitioner,

v.

RICK THALER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

**BRIEF OF THE RUTHERFORD INSTITUTE,
AMICUS CURIAE IN SUPPORT OF
PETITIONER**

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QUESTIONS PRESENTED

I. Whether there was jurisdiction to issue a certificate of appealability under 28 U.S.C. §2253(c) and to adjudicate petitioner's appeal.

II. Whether the application for a writ of habeas corpus was out of time under 28 U.S.C. §2244(d)(1) due to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. JURISDICTION EXISTED TO ISSUE THE CERTIFICATE OF APPEALABILITY TO THE PETITIONER 3

II. JURISDICTION EXISTED TO HEAR AND DECIDE THE PETITIONER'S APPEAL TO THE COURT OF APPEALS 8

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Applegate v. Lexington & Carter County Min. Co., 117 U.S. 255 (1886) 6

Beyer v. Litscher, 306 F.3d 504 (7th Cir. 2002) 9

Boumediene v. Bush, 553 U.S. 723 (2008) 11

Castro v. United States, 540 U.S. 375 (2003) 10

Gonzalez v. Quarterman, 2008 WL 4055779 (N.D. Tex. Aug. 20, 2008) 8

Hagans v. Levine, 415 U.S. 528 (1974) 3

Holland v. Florida, 130 S. Ct. 2549 (2010) 8

In re Brown, 346 F.2d 903 (5th Cir. 1965) 3

Lee v. Wiman, 280 F.2d 257 (5th Cir. 1960) 10

Lonchar v. Thomas, 517 U.S. 314 (1996) 2

Medellin v. Dretke, 544 U.S. 660 (2005) 11

Miller-El v. Cockrell, 537 U.S. 322 (2003) 9, 11

Panetti v. Quarterman, 551 U.S. 930 (2007) 10, 11

Porterfield v. Bell, 258 F.3d 484 (6th Cir. 2001) 12

Rhines v. Webber, 544 U.S. 269 (2005) 10

Rockwell Intern. Corp. v. United States, 549 U.S. 457 (2007) 4

Schlesinger v. Councilman, 420 U.S. 738 (1975) 5

Slack v. McDaniel, 529 U.S. 473 (2000) 7, 9

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 4

Voorhees v. Jackson, ex dem. Bank of U.S., 35 U.S. 449 (1836) 6

Statutes

28 U.S.C. § 2253 ..... passim

28 U.S.C. § 2253(c)(1) 3

28 U.S.C. § 2253(c)(2) 4, 5, 6

28 U.S.C. § 2253(c)(3) 2, 4, 11, 12

Rules

Fed. R. App. P. 22(b) 3

INTEREST OF *AMICUS CURIAE*[1]

Since its founding over 29 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

The case now before the Court concerns the Institute because the decision on the first question certified by the Court will affect the opportunity for prisoners to seek relief from criminal convictions and sentences obtained in violation of fundamental constitutional rights. The writ of habeas corpus has been "aptly described as 'the highest safeguard of

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[1] Counsel of record to the parties in this case have consented to the filing of this *amicus* briefs in support of either party or neither party. No counsel to any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel have contributed monetarily to its preparation or submission.

liberty,'" *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) (quoting *Smith v. Bennett*, 365 U.S. 708, 712 (1961)), and rules regulating judicial consideration of a prisoner's right to the writ should be construed in ways that maintain access to the federal courts. The Institute asks that this Court recognize these principles and protect the constitutional rights of individuals by deciding that there was jurisdiction both to issue the certificate of appealability obtained by the petitioner and to decide the petitioner's appeal.

SUMMARY OF THE ARGUMENT

The jurisdiction of the circuit judge to issue the certificate of appealability should not be affected by the omission from the certificate of the specific issue of substantial import that is required to be set forth under 28 U.S.C. § 2253(c)(3). Jurisdiction of a court or judge to act depends upon the facts as they actually existed, and not the manner in which the authority is exercised, so any defect in the manner in which the circuit judge issued the certificate of appealability does not affect jurisdiction. To the extent jurisdiction to issue the certificate may be impugned on the basis that no "substantial showing of the deprivation of a constitutional right" was made, this should be rejected as a ground for now denying the court of appeals' jurisidiction. The decision of the circuit judge to issue the certificate is entitled to a presumption of correctness and validity and there are no circumstances upon which that presumption should be deemed rebutted.

The deficiency of the form and recitals on the certificate of appealability also should not be held to affect the jurisdiction of the court of appeals to hear the case. Procedural errors by the courts should not be a bar to the vindication of important constitutional rights. Moreover, the gatekeeping function of 28 U.S.C. § 2253 is fully served so long as the certificate is issued.

ARGUMENT

I. JURISDICTION EXISTED TO ISSUE THE CERTIFICATE OF APPEALABILITY TO THE PETITIONER

As the petitioner's brief correctly argues, there was jurisdiction to issue the certificate of appealability under 28 U.S.C. § 2253(c)(1). By its terms, the statute grants to "a circuit justice or judge" the authority to issue a certificate of appealability, and the certificate was issued by Circuit Judge Garza. J.A. 347. *See also* Fed. R. App. P. 22(b) (habeas corpus applicant may request issuance of a certificate of appealability by a "circuit judge"). Because the statute and rule granted Judge Garza the power to issue the certificate, jurisdiction to issue the certificate existed. *See Hagans v. Levine*, 415 U.S. 528, 538 (1974) (jurisdiction is the authority conferred by Congress to decide a particular kind of case) and *In re Brown*, 346 F.2d 903, 910 (5th Cir. 1965) (although jurisdiction is lodged with a court, such jurisdiction may be exercised by a single judge on behalf of the court).

The only grounds on which jurisdiction to issue the certificate might be denied are (1) that the materials presented to the Court of Appeals did not make a "substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2), or (2) that the certificate itself did not conform with 28 U.S.C. § 2253(c)(3) by specifying the constitutional issue found to be substantial by the issuing circuit judge. In raising the jurisdictional issue for the first time in its Brief in Opposition to the Petition for Certiorari, the respondent focused its argument on the latter requirement, questioning the validity of the certificate of appealability because it "nowhere states that Gonzalez has advanced a substantial *constitutional* claim." Cert. Opp. 13.

However, the fact that the certificate of appealability had an omission cannot be deemed to affect the jurisdiction of the circuit judge to issue the certificate. The petitioner clearly had a right to seek the certificate of appealability and the circuit judge had the power to issue it or not issue it. What matters are the circumstances at the time the decision was made, not some circumstance that occurred after the fact. This Court has referred to the rule that "subject-matter jurisdiction 'depends on the state of things at the time the action is brought[.]'" *Rockwell Intern. Corp. v. United* States, 549 U.S. 457, 473 (2007) (quoting *Mullan v. Torrance*, 9 Wheat. 537, 539, 6 L. Ed. 154 (1824)). *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (subject-matter jurisdiction is determined on the basis of facts alleged, and not by the possibility that it will be determined later that the facts are not as pleaded).

And as noted in *Schlesinger v. Councilman*, 420 U.S. 738, 742 n. 5 (1975):

> We think that so long as the court's subject-matter jurisdiction actually existed and adequately appeared to exist from the papers filed, see n. 9, infra, any defect in the manner in which the action was instituted and processed is not itself jurisdictional and does not prevent entry of a valid judgment. See 2 J. Moore, Federal Practice 3.04, pp. 718-720, 3.06(1), pp. 731-732 (2d ed. 1974).

Otherwise, the only reason which could conceivably have deprived the circuit judge of jurisdiction to issue the certificate of appealability is if petitioner's filings in connection with the application did not make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Significantly, the respondent's opposition to the Petition for Writ of Certiorari did not specifically assert this as a ground for denying the petition, relying solely on the failure of the certificate to "state" or specifically identify the substantial constitutional claim. That respondent focused on the omission from the certificate of appealability is not surprising given that the "substantial showing" requirement of § 2253(c)(2) does not relate to the form of the certificate, but relates to the substance of the *applicant's* filings. As shown by the petitioner's merits brief, a substantial Sixth Amendment speedy trial claim was and is presented in this case. Br. for Pet. 16-20.

In any event, the "substantial showing" requirement of § 2253(c)(2) is not jurisdictional, Br. of Pet. 21-25, as nearly all the circuit courts considering the issue have held. *Id.* at 16, n. 3 (citing cases ruling that 28 U.S.C. § 2253(c)(2) is not jurisditional).

Even if satisfaction of the "substantial showing of the denial of a constitutional right" is a jurisdictional prerequisite to the issuance of a certificate of appealability, not only was that requirement satisfied with respect to petitioner's Sixth Amendment claim, Br. of Pet. 16-20, it should be presumed here that the circuit judge made the required determination. "There is no principle of law better settled, than that every act of a court of competent jurisdiction, shall be presumed to have been rightly done till the contrary appears. This rule applies as well to every judgment or decree rendered, in the various stages of their proceedings, from the initiation to their completion; as to their adjudication that the plaintiff has a right of action." *Voorhees v. Jackson, ex dem. Bank of U.S.*, 35 U.S. 449, 469-470 (1836). In *Applegate v. Lexington & Carter County Min. Co.*, 117 U.S. 255, 269 (1886), the Court held that it was improper to exclude evidence of the record in a prior case on the ground that the record did not show on its face that notice of the proceedings were published or posted as required by statute. "It is to be presumed," the Court wrote, "that the court, before making its decree, took care to see that its order of constructive service, on which its right to make the decree depended, had been obeyed." *Id.*

It is wholly appropriate to apply this presumption of regularity and correctness here. Nothing in the record indicates that Circuit Judge Garza did not consider the requirement that petitioner make a substantial showing of a deprivation of a constitutional right. It is implausible to assume that he did not make the required determination given the fact that the "substantial showing" requirement has been in effect for over 14 years and the fact that the requirement is effectively the only determination that must be made with respect to each and every application for a certificate of appealability.

Furthermore, *Slack v. McDaniel*, 529 U.S. 473, 485 (2000), made it eminently clear that, with respect to appeals from denials of habeas petitions based upon procedural grounds, the certificate of appealability inquiry has two components, "one directed at the underlying constitutional claim and one directed at the district court's procedural holding." Indeed, *Slack* encouraged courts to reject certificate applications notwithstanding error on a procedural issue by stressing that a court could first decide whether a substantial constitutional issue was presented by the applicant. *Id.* at 485. Given these instructions, it would be unreasonable to conclude that the circuit judge here ignored the requirement that the applicant make a substantial showing of a deprivation of a constitutional right.

Additionally, the fact that the Sixth Amendment speedy trial claim was not set forth on the certificate is wholly understandable in light of the decision that was rendered in the district court.

That court disposed of the petitioner's entire habeas application solely on the basis that the application was untimely. *Gonzalez v. Quarterman*, 2008 WL 4055779 (N.D. Tex. Aug. 20, 2008). Thus, the timeliness question identified in the certificate of appealability was the primary issue that would need to be decided on appeal in determining whether petitioner was entitled to the writ. Had the court of appeals decided the district court wrongly decided the procedural issue, it likely would have remanded the case to the district court without considering the merits of the Sixth Amendment issue in full because whether the petitioner was denied his right to a speedy trial would likely have been deemed fact-sensitive and more appropriately left to a lower court in the first instance. *Holland v. Florida*, 130 S. Ct. 2549, 2565 (2010). Because the timeliness issue was the principal, if not sole, issue the court of appeals would have had to decide on the appeal, it is not surprising that it was the issue listed on the certificate of appealability. Listing that issue, and not petitioner's Sixth Amendment claim, does not suggest that the circuit judge did not consider and determine that the petitioner's application made a substantial showing of a denial of a constitutional right.

II. JURISDICTION EXISTED TO HEAR AND DECIDE THE PETITIONER'S APPEAL TO THE COURT OF APPEALS

With respect to the jurisdiction to adjudicate the petitioner's appeal, such jurisdiction could be denied only if the omission of the specific

constitutional issue from the face of the certificate of appealabilty deprived the court of appeals of jurisdiction. Otherwise, the court of appeals clearly had jurisdiction because the certificate had been issued in accordance with the requirements of *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Additionally, the petitioner complied with statutes and rules necessary to vest the court of appeals with jurisdiction over his appeal. Br. of Pet. 14-15.

To deny a prisoner the opportunity for federal court review of his constitutional claims because of an omission from the certificate of appealability is overly formalistic and not consistent with the purposes for which the requirement of a certificate was imposed under the Antiterrorism and Effective Death Penalty Act (AEDPA). In *Slack*, 529 U.S. at 483, this Court rejected the contention that the erroneous denial of a habeas petition on procedural grounds was not appealable. "The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a [certificate of appealability] under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights."

Similarly, the procedural error of an appellate court (or, perhaps, a staff attorney, *see Beyer v. Litscher*, 306 F.3d 504, 506 (7th Cir. 2002)) in omitting to set forth in the certificate of appealability the substantial constitutional claim at issue should not bar a prisoner from the opportunity to have that claim reviewed. This principle is particularly applicable in cases such as the one presently before

the court, where the habeas petition was denied on questionable procedural grounds and the district court never considered the merits of the petitioner's constitutional claim. A decision that the omission is not fatal to the applicant's appeal is consistent with precedent holding that the AEDPA's provisions should be interpreted in a way that avoids creating a risk that habeas applicants may forever lose their opportunity for any federal review of their constitutional claims. *Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007); *Rhines v. Webber*, 544 U.S. 269, 265 (2005).

The consequences of a decision that there was no jurisdiction because of the omission from the certificate of appealability will fall particularly hard upon *pro se* habeas applicants like the instant petitioner who are unsophisticated in the procedural and legal niceties of habeas corpus practice. *Pro se* applicants will not appreciate the significance of omissions from certificates of appealability like the one at issue here and will be unable to protect their ability to appeal and, as in this case, their right to federal court review of the merits of their constitutional claim by bringing the omission to the attention of the court. *Pro se* litigants have traditionally been given protection and special consideration by the courts. *See Castro v. United States*, 540 U.S. 375, 381-82 (2003) (court may change label attached to pleading by a *pro* se habeas applicant in order to avoid unnecessary dismissal or to avoid inappropriately stringent application of labeling requirements) and *Lee v. Wiman*, 280 F.2d 257, 264 (5th Cir. 1960) ("An application for habeas corpus presented by a prisoner without the aid of

counsel will not be dismissed for mere technical defects, but will be considered with solicitude for the essential rights of the accused."). Recognizing that the omission from the certificate of appealability at issue here was not sufficient to deprive the court of appeals of jurisdiction will further the policy of protecting *pro se* habeas applicants like the petitioner.

In the final analysis, how the issue specification requirement of 28 U.S.C. § 2253(c)(3) is construed and applied must take account for the fact that § 2253(c) is essentially a "gatekeeping" provision. *Boumediene v. Bush*, 553 U.S. 723, 774 (2008). The concept of a threshold or gateway test for the appealability of district court denials of habeas applications is meant to weed out frivolous petitions, hasten finality of the criminal process, *Miller-El*, 537 U.S. at 337, and promote judicial efficiency and conservation of judicial resources. *Panetti*, 551 U.S. at 945. "By obliging applicants to make a threshold showing before their cases are aired out on appeal, the [certificate of appealability] serves an important screening function and conserves the resources of appellate courts." *Medellin v. Dretke*, 544 U.S. 660, 678 (2005) (O'Connor, J., dissenting).

That function is fully served if the certificate is issued, and defects in the form or content of the certificate should not affect the jurisdiction of the court of appeals to hear the appeal. A judge has had the opportunity to review the certificate application and has determined that there is a constitutional issue presented that is, at the very least, debatable

and should be reviewed on appeal. Whether the precise reasoning of the judge is set forth or the particular issue is identified is not crucial because in the final analysis the judge has found that the case merits review. While there may be more justification for requiring that § 2253(c)(3) be strictly applied when the certificate is issued by a district court judge so that the court of appeals is alerted to the substantial constitutional issue, the same concern does not apply when, as in the instant case, the certificate is issued in the court of appeals.

Moreover, a ruling that defects in the form of a certificate of appealability affect the jurisdiction of the court of appeals will allow for the waste of judicial resources. An after-the-fact holding that jurisdiction did not exist will come after the parties and the court have already invested substantial time in briefing and the review process, contrary to the policy of judicial economy underlying 28 U.S.C. § 2253(c). *Porterfield v. Bell*, 258 F.3d 484, 485 (6th Cir. 2001).

CONCLUSION

For the reasons set forth above, *amicus* requests that this Court hold that any defects in the certificate of appealability issued to the petitioner were not jurisdictional and that the appeal was properly decided by the court of appeals. Technicalities should not stand in the way of persons from obtaining review of substantial claims that their right to life and liberty have been unconstitutionally compromised.

Respectfully submitted,

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